TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 385.

THEODORE H. PRICE, APPELLANT,

vs.

WILLIAM HENKEL, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED MARCH 15, 1909.

(21,551.)

(21,551.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 385.

THEODORE H. PRICE, APPELLANT,

vs.

WILLIAM HENKEL, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Petition for writs of *habeas corpus* and certiorari	1	1
Stipulation as to record, &c	15	9
Order granting writs of *habeas corpus* and certiorari	16	9
Writ of *habeas corpus*	18	10
Marshal's return	19	11
Traverse to return	21	12
Writ of certiorari	23	13
Return to writ of certiorari by John A. Shields, United States commissioner	24	13
Testimony taken before Commissioner Shields	25	14
Motion to dismiss	25	14
Objections to offers, &c	28	15
Testimony of Walter S. Mayer	44	21
Testimony of William H. Leary	58	28
Government rests	61	29
Motion to dismiss renewed	61	29
Hearing resumed	62	29
Motion to dismiss, &c	68	31
Testimony of Jay F. Brown	81	37
Samuel McC. Hawken	85	38
William L. Lanning	113	50

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 14, 1909.

	Original.	Print.
Testimony of Charles L. Matthews	118	52
Charles P. Ward	122	54
Russell Coates	125	56
C. Clinton James	127	56
Richard Cheatham	143	63
Victor H. Olmsted	164	72
Stephen Dubois Fessenden	212	95
Exhibit 1—Cotton schedule	216	97
2—Cotton schedule	219	98
3—Cotton schedule	221	99
4—Cotton schedule	224	101
5—Cotton report, June 2, 1905	226	102
Motion to strike out	228	103
Exhibit 1—Regulations of March 20, 1907	230	103
2—Paragraph 8 of regulations	234	105
B—Removal complaint	239	107
C—Certified copy of indictment No. 26088	251	112
C'—Certified copy of indictment No. 26089	308	137
D—Warrant of arrest	327	146
A—Commitment	332	149
D'—Bench warrant	333	149
D²—Bench warrant	334	150
E—Affidavit of Theodore H. Price	336	152
F—Notice and affidavit of Henry L. Stimson	345	155
Letter of Attorney General, October 5, 1908	353	156
Opinion of Hough, J	357	159
J—Photographs of presentment No. 26088	359	161
K—Photographs of presentment No. 26089	361	163
L—Photograph of endorsement of indictment No. 26088	363	165
M—Photograph of page of minutes of supreme court of District of Columbia	364	166
N—Photograph of page of criminal docket of supreme court of District of Columbia	365	167
S—Certified copies of endorsement on indictment No. 26088, extract from minutes, and page of criminal docket of supreme court, District of Columbia	366	169
T—Certified copy of record of presentment and endorsement of indictment No. 26089	372	172
O—Indictment No. 308 (New York)	377	174
P—Indictment No. 309 (New York)	404	186
Cotton crop report, 1904	422	193
Opinion of John A. Shields, United States commissioner	424	194
Opinion of Ward, C. J	425	195
Order discharging writ of *habeas corpus*	426	195
Petition for appeal and order allowing appeal	429	197
Assignment of errors	433	199
Recognizance on appeal	440	202
Bond for costs	445	206
Citation and service	449	209
Clerk's certificate	452	210

1 In the Circuit Court of the United States for the Southern District of New York.

THEODORE H. PRICE, Petitioner,

vs.

WILLIAM HENKEL, United States Marshal in and for the Southern District of New York, and JOHN A. SHIELDS, United States Commissioner for the Southern District of New York.

In the Matter of the Petition of THEODORE H. PRICE for Writs of *Habeas Corpus* and Certiorari.

To the Circuit Court of the United States for the Southern District of New York:

The petition of Theodore H. Price respectfully shows:

I. That your petitioner is a citizen of the United States, and a citizen and resident of the Southern District of New York, and is imprisoned and restrained of his liberty by William Henkel, United States Marshal for the Southern District of New York, in the City of New York, and County of New York in said District, unlawfully and in violation of his rights under the Constitution and Statutes of the United States.

II. That your petitioner is held by said Marshal under color and claim of authority of the United States by virtue of an order of commitment, a true copy of which is attached hereto and made a part hereof and marked "Exhibit A," and that he has been

2 committed and is detained only under and by virtue of said commitment and not by virtue of any judgment, decree or final order of any Court.

III. That on the 30th day of November, 1908, at the City of New York, in said Southern District of New York, a complaint in writing, purporting to be signed and sworn to by Goldthwaite H. Dorr, a copy whereof is hereto attached, and marked "Exhibit B," and made a part hereof, was presented to John A. Shields, Esq., Commissioner of the District Court of the United States for the said District; that annexed to said complaint were certain papers purporting to be certified copies of indictments, copies whereof are hereto annexed and made a part hereof and marked respectively "Exhibit C" and "Exhibit C'."

IV. That thereafter, to wit, on the said 30th day of November, 1908, a warrant for your petitioner's arrest was issued by the said John A. Shields, Commissioner as aforesaid, upon the aforesaid complaint, and the papers thereto annexed, as above set forth, and upon no other papers or evidence; which said warrant came to the hands of the said William Henkel, Marshal as aforesaid, and he, in obedience thereto, arrested your petitioner and brought him before the said John A. Shields, Commissioner as aforesaid, and made return of said warrant endorsed thereon, and that a copy of said war-

rant, with the endorsement thereon, is hereto attached, marked "Exhibit B," and made a part hereof.

V. That thereupon your petitioner applied for an examination into the causes of his restraint, in pursuance of the rights and privileges accorded to him by Section 1014 of the Revised Statutes
3 of the United States, and a day was set for said examination, and your petitioner was admitted to bail pending such examination and the decision thereon, and such examination having thereon been adjourned from time to time, finally came on for hearing before the said Commissioner on the 2nd day of November, 1908, and was thereafter continued from time to time and finally concluded on the 23rd day of February, 1909.

VI. That upon said examination the United States Attorney, in and for the Southern District of New York, for and on behalf of the United States, offered and introduced in evidence to and before the said Commissioner, in support of the averments of the complaint of said Goldthwaite H. Dorr:

Certain papers purporting to be certified copies of the said alleged indictments, mentioned and referred to in the said complaint, copies whereof are hereto attached and marked exhibits "C" and "C'" and made a part hereof;

Certain alleged bench warrants, copies whereof are hereto annexed and marked exhibits "D" and "D[1]" respectively and made a part hereof;

A certain affidavit of Theodore H. Price, verified the 12th day of October, 1908, a copy whereof is hereto annexed and marked exhibit "E";

A certain affidavit of Henry L. Stimson, verified the 6th day of October, 1908, together with the endorsement made thereon by Judge Hough, a copy whereof is hereto annexed and marked exhibit "F";

And the following named witnesses, to-wit, Walter S. Mayer and William H. Leary, were duly sworn before the said Commissioner at the instance of the said United States Attorney in behalf of the United States, and they and each of them testified to the facts
4 and in the words and figures set forth in the official stenographer's Minutes of the proceedings had before such Commissioner, a true copy whereof, with the testimony of each of said witnesses set forth under his name, is hereto attached and made a part hereof and marked Exhibit "G."

That thereafter the Government offered in evidence the following named documents, to wit:

A copy of a certain cotton-crop report issued by the Department of Agriculture in the month of June, 1904, a copy whereof is hereto annexed and marked Exhibit "G."

A copy of certain regulations of the Department of Agriculture, dated March 20th, 1907, and designated as General Order number 2, a copy whereof was read into the Minutes of the official stenographer as Exhibit 1 of February 18th, 1909, and is hereto annexed.

A copy of paragraph 8 of the Rules for Employees of the United States Department of Agriculture, dated December 19th, 1901, a

copy whereof was read into the Minute of the official stenographer as Exhibit 2 of February 18th, 1909, and is hereto annexed.

VII. And the Government offered no further proof or evidence in support of said complaint or of the averments therein, and presented no other or further proof or evidence before the said Commissioner.

VIII. That thereafter your petitioner offered and introduced in evidence before the said Commissioner the following papers and documents, to-wit:

A certified transcript of a record of the Supreme Court of
5 the District of Columbia, including therein: (1) A certain presentment against Theodore H. Price, Moses Haas and Frederick A. Peckham, and the endorsement thereon; (2) The endorsement on a certain alleged bill of indictment against Theodore H. Price Moses Haas and Frederick A. Peckham; (3) An abstract from the Minutes of the said court as of the 29th day of May, 1908, reciting the filing of certain indictments therein; (4) A portion of the criminal docket of the said court, relating to certain indictments therein; a copy of which said transcript of the record is hereto annexed and marked Exhibit "H."

A certain other transcript of record of the Supreme Court of the District of Columbia, including therein a certain presentment against Theodore H. Price and Moses Haas, together with the endorsement thereon; a copy whereof is hereto annexed and marked Exhibit "I."

A photograph of the face of the said presentment against Theodore H. Price, Moses Haas and Frederick A. Peckham, a copy whereof is hereto annexed and marked Exhibit "J."

A photograph of the back of the said presentment, including the endorsements thereon, a copy whereof is hereto annexed and marked Exhibit "J'."

A photograph of the face of the said presentment against Price and Haas, a copy whereof is hereto annexed and marked exhibit "K."

A photograph of the back of the said presentment against said Price and Haas, a copy whereof is hereto annexed and marked exhibit "K'."

A photograph of the endorsement upon an alleged indictment No. 25088 as appearing upon the files of the Supreme Court of the
6 District of Columbia, a copy whereof is hereto annexed and marked Exhibit "L."

A photograph of a page of the Minutes of the Court of the said Supreme Court of the District of Columbia, a copy whereof is hereto annexed and marked Exhibit "M."

A photograph of a page of the criminal docket of the said Supreme Court of the District of Columbia, a copy whereof is hereto annexed and marked Exhibit "N."

A certified copy of a certain indictment No. 308, returned by the Grand Jury in the Southern District of New York on the 29th day of May, 1908, a copy whereof is hereto annexed and marked Exhibit "O."

A certified copy of a certain other indictment filed by the Grand

Jury in the Southern District of New York on the 29th day of May, 1908, No. 309, a copy whereof is hereto annexed and marked exhibit "P."

A certain form of Township Correspondents' schedule of March, 1905, which was read into the official stenographer's Minutes as Exhibit 1 of February 17th, 1909, and is hereto annexed.

A certain form of County Correspondents' schedule of March, 1905, which was read into the official stenographer's Minutes as Exhibit 2, of February 17th, 1909, and is hereto annexed.

A certain form of Township Correspondents' schedule of March, 1904, which was read into the official stenographer's Minutes as Exhibit 3 of February 17th, 1909, and is hereto annexed.

A certain form of County Correspondents' schedule of
7 March, 1904, which was read into the official stenographer's Minutes as Exhibit 4 of February 17th, 1909, and is hereto annexed.

A copy of a certain cotton-crop report issued by the Department of Agriculture, Bureau of Statistics, on June 2nd, 1905, which was read into the official stenographer's Minutes as Exhibit 5 of February 17th, 1909, and is hereto annexed.

And your petitioner further offered and introduced the proof and evidence of the following named witnesses, to-wit:

J. F. Brown, Samuel McC. Hawken, William L. Lanning, Charles L. Matthews, Charles P. Ward, Russell Coates, C. Clinton Jame', Richard Cheatham, Victor Olmstead and Samuel D. Fessenden, each of whom testified to the facts set forth after his name in the copy of the stenographer's minutes of the proceedings had before the said Commissioner, which has been heretofore referred to and made a part hereof, and marked Exhibit "G."

That the said proof and evidence, both oral and documentary, was offered to maintain the issues in this proceeding by the petitioner to be maintained and to show that your petitioner did not in the District of Columbia, on the 15th day of November, 1904, or during the period between the 15th day of November, 1904, and the 5th day of July, 1905, or on the 5th day of July, 1905, or at any other time, engage in the said alleged conspiracies in the said indictments mentioned, or in any or either of them, or at any time or at any place, join in or assent to the said alleged conspiracies engaged in or entered upon in the said District of Columbia, or either of them, or
8 at any time or at any place, do any acts in furtherance or to effect the object of said alleged conspiracies or either of them; and that there was no probable cause to believe him guilty of any offense against the laws of the United States, and that he was not the person mentioned in the said alleged indictments and warrants, and that the said alleged indictments were null and void and that no such indictments as were referred to in the said removal complaint had in fact been found or returned by the Grand Jury in the District of Columbia; that if any crime was charged against him, it was a crime committed in and triable in the Southern District of New York and not in the District of Columbia, and that any such crime was barred by the Statute of Limitations.

IX. That in the course of the said hearings before the said Commissioner, your petitioner offered testimony and evidence in his behalf and to establish the issues by him to be maintained, to-wit, that there is and was no probable cause to believe him guilty of an offense against the laws of the United States or of any offense cognizable by the court of the United States in the District of Columbia, and to that end propounded certain questions and interrogatories to one William L. Lanning, the said Lanning being then and there before the said Commissioner and sworn by him, and being one of the persons whose name appears endorsed as a witness upon the said alleged indictments hereto annexed as Exhibits "C" and "C'"; all of which questions and interrogatories were pertinent to the said issues, as your petitioner is informed and advised by counsel, and the said Commissioner refused to permit said testimony and evidence to be introduced before him and refused to permit the said witness to answer the questions thus propounded to him, all of which more fully appears by the stenographer's Minutes of the proceedings had before the said Commissioner, a copy of which is hereto annexed and made a part hereof and marked exhibit "G"; that thereupon the petitioner offered to produce before the said Commissioner the following named witnesses, to wit, Andrew Parker, Samuel S. Baulsir, Nathaniel Murray, Lewis C. Van Riper, Herbert H. Smith, Richard H. Springs, Victor Armistead, Russell Coates and Walter Mayer, being the same persons whose names are endorsed upon the alleged copies of indictments annexed hereto and marked exhibits "C" and "C'," and offered to ask of the said witnesses the same questions that he had heretofore asked of the said Lanning and which the Commissioner had refused to allow to be answered, and offered to prove by the said witnesses that they and none of them had any information which would tend in any way to connect your petitioner with any conspiracy alleged to have been formed in the District of Columbia or alleged to have been entered into in any place, and that their testimony, if given in open court, would have no tendency to establish probable cause to believe that your petitioner was guilty of the crime attempted to be set forth in the indictment or of any crime; and the said testimony was rejected by the said Commissioner and the said Commissioner refused to permit the evidence of the said witnesses to be introduced and it was agreed that his said refusal so made should have the same force as though each of the questions theretofore put to the said witness Lanning had been put to each of the other named witnesses and had been specifically ruled upon and rejected.

9

That the foregoing, together with the testimony and other proceedings appearing in the stenographer's minutes hereto annexed and marked exhibit "G," embrace all the proof before the said Commissioner and as your petitioner is informed and believes, all the evidence upon which he claims the right to issue the commitment by virtue of which your petitioner is detained.

10

X. That upon the close of the hearings before the said Commissioner, your petitioner by his counsel, moved the said Commissioner for a dismissal of the said proceedings upon the ground that the evi-

ters before the said Commissioner did not justify or permit a finding by him that there was probable cause to believe that your petitioner was guilty of any crime or offense against the laws of the United States cognizable by the courts of the District of Columbia, and upon the ground that there were no matters or facts before the said Commissioner which would accord to him jurisdiction to issue any writ or order for your petitioner's detention, and upon the other grounds set forth in the stenographer's record of the proceedings herein, copy of which is hereto annexed and marked exhibit "G;" and that thereupon said Commissioner issued his said order of commitment hereinabove referred to and marked exhibit "A;" and thereupon, and upon the authority thereof, the said William Henkel took your petitioner into custody and now holds him in custody; and as your petitioner is informed and believes, the said order of commitment thus issued is the sole cause or pretense for the imprisonment of your petitioner by the said William Henkel.

XI. Your petitioner further says that he is advised and he charges and submits that under and by virtue of Clause 3 of Section 2 of Article 3 of the Constitution of the United States and of the Sixth Amendment to the said Constitution, your petitioner is entitled to be tried, and can only be indicted and tried for any
11 alleged offenses against the laws of the United States in the State and District in which the offense or offenses which the indictment or indictments charge were committed; that, as appears by the record before the Commissioner, the said supposed offenses in the said indictments mentioned and charged were not, nor were any or either of them, committed in the said District of Columbia; that none of the alleged acts, transactions, matters or things which are in the said indictments mentioned or referred to as being and constituting the supposed engaging by your petitioner in the said alleged conspiracies in the said indictments referred to, or any or either of them, were done or held or took place within the said District of Columbia, and no alleged act, transaction, matter or thing in the said indictments mentioned or referred to as being the doing by your petitioner of an act to effect the object of said conspiracy, was done or held or took place within the District of Columbia; that it further appears by the said record that your petitioner was not on the 15th day of November, 1904, or at any time subsequent thereto in the District of Columbia; and there is nothing in the said proceedings showing or tending to show that your petitioner entered, assented to, joined or engaged in the conspiracies in the indictments mentioned, or any of them, in the District of Columbia at the time mentioned therein or at any other time, or that he, within the period mentioned, or at any other time, within the District of Columbia, did any act or thing to promote the furtherance of said conspiracies in the indictments mentioned, or any of them, or to effect the objects or purposes of the same, or at any time or place joined, assented to, entered or engaged in the conspiracies, or any of them, alleged or averred in said indictments, or did any act in pur-
12 suance of the said alleged conspiracies in the said indictments mentioned, or any or either of them, in furtherance

of the said alleged conspiracies in said indictments mentioned, or any or either of them, or to effect the object of the same, or as an act on the part of your petitioner of engaging in the same.

XII. Your petitioner further says that he is advised and that he charges and submits that under and by virtue of the said Articles of the Constitution of the United States, and by virtue of the Fifth Amendment of the Constitution of the United States, he is privileged from arrest and detention, and that he may not be deprived of his liberty by the process on the faith of which he is detained, and may not be detained save and except upon a charge that he has violated a law of the United States, and save and except such charge be supported by legal proof before the officer issuing the said process, sufficient to establish that there is probable cause to believe him guilty of the said charge, and that neither in the said indictments, nor in the testimony of the said witnesses, nor in all the evidence submitted to the said Commissioner is there any proof to sustain a charge that your petitioner has violated any of the laws of the United States, or that he has violated any of the laws of the United States in the District of Columbia, nor is there any evidence sufficient to establish that there is probable cause to believe him guilty of any offense against the United States, or of any offense cognizable by any Court of the United States.

XIII. That indictments have been returned against your petitioner in the Federal court for the Southern District of New York by the Grand Jury of the Southern District of New York, purporting to charge the same alleged offenses as are attempted to be set
13 forth in exhibits "C" and "C'" hereto annexed, save and except that they charge and aver that the said alleged offenses were committed within the Southern District of New York; that your petitioner has given bail for his appearance to answer said indictments and that your petitioner is advised that under the provisions of the Constitution of the United States and the amendments thereto, he is entitled to be tried upon the said charges of crime in the said Southern District of New York and may not be tried therefor elsewhere.

XIV. That your petitioner is informed that by the exclusion of the evidence offered by him as hereinbefore set forth in this petition, and by the exclusion of other evidence offered by him, as appears by Exhibit "G" hereto annexed, he was denied the right to present proof in opposition to the evidence offered against him by the United States, and was unlawfully prevented from maintaining the issues by him to be maintained, to-wit, that there was no probable cause to believe him guilty of any crime cognizable by the courts of the District of Columbia, and that he was thereby denied due process of law, and that his detention under the said commitment violates his rights under Article 3, Section 2 and under the Fifth and Sixth Amendments to the Constitution of the United States.

XV. That your petitioner is informed and believes that there was no sufficient evidence before the Commissioner to establish that he was the person charged by the indictments with the acts averred therein, and avers that for this reason his detention is without due

process of law and in violation of his rights under the Constitution of the United States and the Sixth Amendment thereof.

Wherefore your petitioner prays that a writ of *habeas corpus* issue, directed to the said William Henkel, or to such other person as then may have your petitioner in custody, commanding him to bring the body of your petitioner before this court forthwith; and your petitioner further prays that a writ of certiorari in aid of the said writ of *habeas corpus* be issued, directed to the said Honorable John A. Shields, United States Commissioner as aforesaid, commanding that he return all proceedings against your petitioner to this court forthwith for such action as may be proper in the premises.

11

Dated March 2nd, 1909.

THEODORE H. PRICE,
Petitioner.

NICOLL, ANABLE, LINDSAY & FULLER,
Attorneys for Petitioner.

Office and P. O. Address, 31 Nassau Street, Borough of Manhattan, City of New York.

UNITED STATES OF AMERICA,
Southern District of New York,
County of New York, ss:

Theodore H. Price, being duly sworn, deposes and says that he has read the foregoing petition and knows the contents thereof and that the same is in all respects true.

THEODORE H. PRICE.

Subscribed and sworn to before me this 2nd day of March, 1909.

JOHN A. SHIELDS,
U. S. Commissioner.

11½ (Endorsed:) Supreme Court of the United States, Southern District of New York. Theodore H. Price, Petitioner, against William Henkel, United States Marshal in and for the Southern District of New York, and John A. Shields, United States Commissioner for the Southern District of New York. Petition for Writs of *Habeas Corpus* and Certiorari. Nicoll, Anable, Lindsay & Fuller, Attorneys for Petitioner, 31 Nassau Street, New York. U. S. Circuit Court, Southern District of N. Y., Filed Mar. 2, 1909. John A. Shields, Clerk.

15 United States Circuit Court, Southern District of New York.

THEODORE H. PRICE, Petitioner,
vs.
WILLIAM HENKEL, United States Marshal in and for the Southern District of New York, and JOHN A. SHIELDS, United States Commissioner for the Southern District of New York.

The petition for the Writs of *Habeas Corpus* and Certiorari having recited and having annexed thereto a copy of the stenographic record of testimony taken before the Commissioner and copies of all exhibits produced before him, and the Commissioner having returned the said stenographic record of testimony and the said exhibits in his return to the Writ of Certiorari, the same being in all respects identical with those annexed to the petition.

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the testimony and exhibits returned by the said Commissioner be deemed a part of the petition herein, and

It is further stipulated and agreed that the said same testimony and exhibits need not be duplicated in the record.

New York, March 9th, 1909.

NICOLL, ANABLE, LINDSAY & FULLER,
Attorneys for Petitioner.
HENRY L. STIMSON,
Attorney for Respondent.

16 At a Stated Term of the Circuit Court of the United States, in and for the Southern District of New York, held at the United States Court House and Postoffice Building in the Borough of Manhattan and City of New York, on the 2nd day of March, 1909.

Present: Hon. Henry G. Ward, Circuit Judge.

THEODORE H. PRICE, Petitioner,
against
WILLIAM HENKEL, United States Marshal in and for the Southern District of New York, and JOHN A. SHIELDS, United States Commissioner for the Southern District of New York, Respondents.

In the Matter of the Petitioner of THEODORE H. PRICE for Writs of *Habeas Corpus* and Certiorari.

On reading and filing the petition of Theodore H. Price, duly verified the 2nd day of March, 1909, for a writ of *habeas corpus*, directed to William Henkel, Esquire, United States Marshal in and for the Southern District of New York, requiring him to bring and have the petitioner before this Court, together with the true cause of his detention and the restraint of the petitioner, to the end that this Court might act thereupon as of right and according to law ought to be done, and for a writ of certiorari directed to the Honor-

able John A. Shields, United States Commissioner for the Southern District of New York, in aid thereof, commanding that he return all proceedings against your petitioner to this Court forth-
17 with for such action as might be proper in the premises.

Now, after hearing Howard S. Gans, Esquire, of counsel for the said petitioner in support of the application for such writ, and Goldthwaite H. Dorr, Esquire, of counsel for the respondents, in opposition thereto, and due deliberation having been had, it is

Ordered, that the said application be, and it hereby is, in all things, granted, and the Clerk of this Court is hereby

Ordered to issue said writs.

H. G. WARD,
U. S. C. J.

Endorsed: Circuit Court of the United States, Southern District of New York. Theodore H. Price, Petitioner, against William Henkel, United States Marshal in and for the Southern District of New York, and John A. Shields, United States Commissioner for the Southern District of New York. Order granting writs of *habeas corpus* & certiorari. Nicoll, Anable, Lindsay & Fuller, Attorneys for Petitioner, 31 Nassau Street, New York. — Price produced by U. S. Marshal and paroled in custody of counsel pending decision on Writ. H. G. Ward, U. S. Judge, N. Y. March 2, 1909. U. S. Circuit Court, Southern District of N. Y., Filed Mar. 2, 1909, John A. Shields, Clerk.

18 The President of the United States of America to William Henkel, United States Marshal for the Southern District of New York, and to any person having custody of Theodore H. Price under the authority of said United States Marshal, Greeting:

We command you that you have the body of Theodore H. Price, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention by whatsoever name the said Theodore H. Price is called or charged before the Circuit Court of the United States for the Southern District of New York, held in the Postoffice Building in the City of New York, County of New York, State of New York, on March 2nd, 1909, forthwith, to do and receive what shall then and there be considered concerning said Theodore H. Price, and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States of America, the 2nd day of March, 1909.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

Endorsed: Circuit Court of the United States, Southern District of New York. Theodore H. Price, Petitioner against William Henkel, United States Marshal for the Southern District of New York, and John A. Shields, United States Commissioner for the Southern District of New York. Writs of *habeas corpus* and certiorari. Nicoll, Anable, Lindsay & Fuller, Attorneys for Petitioner, 31 Nassau Street, New York. U. S. Circuit Court, Southern District of N. Y. Filed Mar. 4, 1909. John A. Shields, Clerk.

19 United States Circuit Court, Southern District of New York.

In the Matter of the Application of THEODORE H. PRICE for a Writ of *Habeas Corpus.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

William Henkel, being duly sworn, deposes and says:

That he is United States Marshal for the Southern District of New York.

That upon the second day of March, 1909, the writ of *habeas corpus* to which this return is annexed, was served upon him directing him to have the body of one Theodore H. Price by him imprisoned and detained at a Stated Term of the Circuit Court of the United States for the Southern District of New York, March 2, 1909, forthwith, together with the time and cause of such imprisonment and detention and together with the said writ of *habeas corpus.*

Your deponent further certifies that upon the service of said writ he forthwith produced the body of said Theodore H. Price and that the Court thereupon took custody of said Theodore H. Price.

That at the time of the service of said writ said Theodore H. Price was in his custody under and by virtue of a warrant of commitment dated March 1, 1909, hereto annexed, which commanded this deponent as United States Marshal aforesaid in the name and by the authority of the United States of America to take the said defendant into his custody and him safely keep, until he should be ordered by the District Judge to remove to the District of Columbia for
20 trial, or otherwise dealt with according to law. By virtue of said commitment this deponent took said Theodore H. Price into his custody on the second day of March, 1909, and detained him in his custody until the service of said writ and until his surrender into the custody of the Court.

WILLIAM HENKEL.

Sworn to before me this 2nd day of March, 1909.

FREDERICK D. CAMPBELL,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Mar. 1, 1909, John A. Shields, Clerk.

21 *Traverse to the Return.*

United States Circuit Court, Southern District of New York.

THEODORE H. PRICE, Petitioner,
against
WILLIAM HENKEL, United States Marshal in and for the Southern District of New York, and JOHN A. SHIELDS, United States Commissioner for the Southern District of New York.

The said Theodore H. Price, your petitioner herein, in answer to the return of the said William Henkel, United States Marshal for the Southern District of New York, to the writ of *habeas corpus*, directed to him in the above matter, respectfully shows:

That the order of commitment returned by the said William Henkel as the cause of your petitioner's detention is void and of no effect, for the reasons set forth in the petition heretofore filed herein for the issuance of the writ, which your petitioner begs leave to incorporate as part of this his traverse, with the same force and effect as though the same were hereto annexed and set forth at length.

Wherefore your petitioner prays for an order discharging him from the custody of the said William Henkel.

Dated—March 4th, 1909.

THEODORE H. PRICE.

NICOLL, ANABLE, LINDSAY & FULLER,
Attorneys for the Petitioner.

Office & P. O. Address, 31 Nassau Street, Borough of Manhattan, City of New York.

22 UNITED STATES OF AMERICA,
Southern District of New York,
County of New York, ss:

Theodore H. Price, being duly sworn, deposes and says that he has read the foregoing traverse and knows the contents thereof and that the same is in all respects true.

THEODORE H. PRICE.

Subscribed and sworn to before me this 4th day of March, 1909.
H. G. WARD,
U. S. C. J.

Endorsed: Circuit Court of the United States, Southern District of New York. Theodore H. Price, Petitioner against William Henkel, United States Marshal for the Southern District of New York, and John A. Shields, United States Commissioner for the Southern District of New York. Traverse to the Return. Nicoll, Anable, Lindsay & Fuller, Attorneys for Petitioner, 31 Nassau Street, New York. U. S. Circuit Court, Southern District of N. Y. Filed Mar. 4, 1909. John A. Shields, Clerk.

23 The President of the United States of America to John A. Shields, United States Commissioner for the Southern District of New York, Greeting:

Whereas in a certain proceeding in the Circuit Court of the United States for the Southern District of New York, in which Theodore H. Price is petitioner, and William Henkel, United States Marshal for the Southern District of New York, and John A. Shields, United States Commissioner for the Southern District of New York, are respondents, a writ of *habeas corpus* has been issued and a writ of certiorari in aid thereof has been directed; you therefore are hereby commanded that, searching the records and proceedings in said cause, you certify forthwith to the Circuit Court of the United States for the Southern District of New York, held in the Postoffice Building in the City of New York, County of New York, on the 2nd day of March, 1909, forthwith, under your seal, a full, true and complete transcript of the record and proceedings in the above entitled cause, plainly and distinctly, and in as full and ample a manner as the same now remain before you, together with this writ, so that the said Circuit Court of the United States for the Southern District of New York may be able thereon to perceive and do what shall appear to it of right ought to be done.

Herein fail not.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States of America, the 2nd day of March, 1909.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

24 UNITED STATES
vs.
THEODORE H. PRICE.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, United States Commissioner for the Southern District of New York, do hereby certify, in obedience to the foregoing Writ of Certiorari that the papers hereunto annexed and returned herewith contain the record of the proceedings had before me in the above entitled matter.

Dated New York, March 2, 1909.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

25 Before John A. Shields, Esquire, United States Commissioner for the Southern District of New York.

Complaint on Removal to the District of Columbia. R. S., Sec. 1014, 5440.

UNITED STATES
vs.
THEODORE H. PRICE.

NEW YORK, *December 2nd*, 1908.

Appearances: G. H. Dorr, Esq., for the United States. Nash Rockwood, Esq., Howard Gans, Esq., Messrs. Nicoll, Anable, Lindsay & Fuller, by Mr. Fuller, for the accused.

Mr. GANS: If the Court please, we move to dismiss this proceeding on the ground that the complaint on which it is founded is insufficient in that it fails to state or set out that there was issued any bench warrant from the Court of the District of Columbia on
26 the basis of the alleged indictments which are annexed to the complaint.

On the further ground that the warrant of arrest under which the accused in this proceeding has been held is insufficiently definite.

On the further ground that as the complaint is on information and belief and is fortified by no further evidence here of facts that may be said to be contained in the alleged certified copies of the indictments, and as the indictments set forth no crime, that there is nothing before the Commissioner which authorized the issuance of a warrant, or which authorizes any further proceedings, and that therefore the Commissioner is without jurisdiction to take evidence in this case.

On the further ground that an attempt is made in one removal proceeding to join charges attempted to be set forth in two indictments, and that there is no jurisdiction to remove in one proceeding upon the basis of two indictments.

On the further ground that the papers annexed to the complaint purporting to be copies of indictments are not so certified or exemplified as to be regarded as evidentiary matter in this court,
27 and are therefore incompetent and inadmissible as evidence for any purpose.

On the further ground that it appears on the face of the papers alleged to be copies of indictments that if any crime was committed as alleged therein, it was committed at a time prior to three years from the date of the finding of the indictments, and that such alleged crime is barred by the statute of limitations.

On the further ground that in the absence of any allegation in the complaint that a bench warrant has been issued in the absence of any other allegation to supply it, there is no evidence that the accused is wanted in the District of Columbia, or that his removal has been demanded by the Courts of the District of Columbia.

On the further ground that the papers annexed to the complaint purport merely to be copies of alleged certified copies; that the ac-

cused in removal proceedings is entitled to have presented for his inspection matter which is itself of evidentiary value, and that a copy of a certified copy is not a sufficient basis for removal proceedings and is not evidence of any facts upon which a removal proceeding can be based.

Mr. DORR: The sources of information are alleged to be
28 authenticated copies of copies which are attached to the indictments.

Objection overruled. Exception taken.

Mr. DORR: I offer in evidence authenticated copy of an indictment found in the Supreme Court of the District of Columbia and filed on May 29, 1908, No. 26088, in which Theodore H. Price is named as a defendant under the charge that he, with divers other persons, conspired to defraud the United States and to commit an offence against the United States.

Mr. GANS: We object to the admission of the paper offered on the following grounds:

First, that the alleged authentication is insufficient in law, and that the matter offered purporting to be so authenticated is not evidentiary matter, and is not competent or permissible to be received in this proceeding.

Second, That the paper annexed to the said alleged authentication and purporting to be an indictment is incompetent, irrelevant and immaterial in that it fails to set forth any charge or crime, or any crime cognizable by the courts of the United States, or any crime cognizable by the courts of the District of Columbia, statutory or otherwise.

29 On the further ground that it appears upon the face of the said alleged indictment that if any crime of the character charged therein was committed, that that crime was perfect and indictable more than three years prior to the finding of this indictment, and that as to the crime attempted to be alleged therein, if any, the Statute of Limitations has run and is a bar to any proceedings thereon.

On the further ground that there is not sufficient evidence that the paper offered as an indictment herein was ever signed by the foreman of the Grand Jury, and upon the further ground that the alleged copy of the alleged signature purporting to be that of the foreman of the Grand Jury is endorsed on a sheet of paper reading United States against Theodore H. Price, Moses Haas and Frederick A. Peckham, and purporting to charge a conspiracy to defraud the United States and to commit an offense against the United States, alleged to have been committed by Theodore H. Price, Moses Haas and Frederick A. Peckham, whereas there is no paper presented to the Commissioner which contains any allegation purporting to set forth that Price, Haas and Peckham entered into any conspiracy of any kind or nature whatsoever, and that there is no evidence
30 that there is in existence anywhere, in any court, any indictment charging Theodore H. Price, Moses Haas and Frederick A. Peckham with any offense

On the further ground that the sheets of paper containing an at-

tempt to charge a conspiracy against Theodore H. Price, Moses Haas and Edwin Holmes, Jr., contains no endorsement of the foreman of the Grand Jury purporting to certify that such an indictment was found by that body, and that the paper last described contains no endorsement of the names of any witnesses.

The COMMISSIONER: Are there counts in this indictment that were passed upon by Judge Holt?

Mr. DORR: No, they are not the same counts, but they are near enough like them to make it unnecessary to raise them.

The COMMISSIONER: In what I have already passed on certain counts were eliminated. Now if those same counts are in this do you want to let them stand?

Mr. DORR: I think I will let them stand for the present.

Mr. GANS: Then I add to the grounds of my objection that the paper purporting to be a copy of an indictment contains, and that the complaint recites certain alleged charges of crime,
31 namely, those contained in the 4th, 6th and 8th counts of the complaint and of the indictment, which upon their face appear to charge no offense against the United States, and which it has been held in a proceeding in which some of the defendants in this indictment were parties, did not charge any offense against the United States, and that as the paper is offered as a whole it ought not to be admitted as evidence unless as a whole and in every count thereof it charges a crime.

Mr. DORR: No charge has ever been made against Mr. Price previously for conspiracy to commit the offense of misconduct in office, and so there has never been any ruling on such an indictment in this district. This particular indictment charges the offense of misconduct—certainly in some count—as that of procuring the making of false and inaccurate government crop reports, and I think your Honor will recall that in Judge Holt's opinion in the Haas case on another indictment, he dwelt upon the fact that there was no charge of an affirmative act on the part of Holmes in violation of duty. I think it will save time and will not prejudice the Government's rights if the Government now consents to the dismissal of counts 4, 6 and 8 of the complaint on removal, and
32 if that motion is granted the Government will amend its proffer of evidence to exclude counts 4, 6 and 8 of the authenticated copy of the indictment which has been offered in evidence.

Mr. GANS: To preserve our rights we want to note an objection to the amendment of the proceedings at this stage upon the ground that we are entitled to be removed upon the basis of the complaint made or to have that complaint dismissed and a new proceeding instituted.

The COMMISSIONER: I will grant the District Attorney's motion and give an exception.

Mr. GANS: Now, then, there is one point that I have raised which has not been passed on before and that I would like you to give your attention to if you will, sir. In indictment No. 26088 you will see that the only thing that purports to be an endorsement of the fore-

man's name, the only authentification of the indictment, the only thing that is evidence that any bill was passed by a Grand Jury, is the endorsement "United States against Theodore H. Price, Moses Haas and Frederick A. Peckham. Now when you turn to the paper which has been put into that back you find that that is a paper which attempts to set forth a charge, not against Theodore H. Price, Moses Haas and Frederick A. Peckham, but a charge
33 against Theodore H. Price, Moses Haas and Edwin Holmes.

Now the situation here is that though the Grand Jury having had under deliberation and having intended possibly to find an indictment charging Price, Haas and Peckham with conspiracy, and having signed a paper in which it suggested, or in which they said that they intended to so charge, the District Attorney—inadvertently it may be, but none the less erroneously—had slipped in the indictment against other persons. Now we cannot be indicted by the mistake of the District Attorney; we have got to be indicted by the Grand Jury, and we have got to be held, if held at all, for the crime charged by the Grand Jury. It appears by this authentification that possibly the Grand Jury may have intended to charge a conspiracy between three other persons, but that they did not intend to charge a conspiracy had been committed by the three persons who are mentioned in the body of the paper to which this endorsement is annexed. You see, by this authentification it appears the Grand Jury has not found any such indictment as is set forth on the face; they have not found according to this authentification and that is all we have. They have not found any indictment against Price, Haas and Holmes. They were prepared to sign, if there had been submitted to them, apparently an indict-
34 ment against Price, Peckham and Haas; but no such indictment has been submitted to them; no such allegations are contained. Now, we cannot be tried on an indictment for conspiring with Peckham unless such an indictment had been found. Where the indictment alleges the charge of conspiring with Holmes we cannot be charged with conspiring with Peckham if the indictment alleges conspiring with Holmes.

Mr. DORR: On that point, the objection is a technical one. The face of the indictment charges an offence against Price and Haas and mentions Holmes as the other conspirator. Now, by some stenographer's error on the back of the indictment, which I suppose is not properly part of the indictment at all, Peckham's name appears instead of Holmes' name. But that does not affect the names of Price and Haas. The rest is an authenticated copy of the indictment as it is on the files, and the variance between the fact, the mere heading on the back and the substance of the indictment cannot certainly in this proceeding affect the validity of the indictment. That is certainly a matter which should be left—a technical matter which should be left to the Court in which the indictment was found. It is for them to determine whether or not this mere
35 heading for the guidance of the clerk on the back of the indictment is a formal part of the indictment and whether such variance is material.

Mr. FULLER: That is not the point, though, if your Honor pleases. The District Attorney seems to think that it can be explained away by merely calling the endorsement on the back a stenographer's error, but if that is so why we might as well suppose that the name "Price" in the purported indictment is a stenographer's error. There is no authority for such supposition as that, and these papers bear the authentication of the clerk in the District of Columbia as copies of papers filed in his office. The clerk certifies that these are papers that are returned by a Grand Jury and are found in his office. Now, if that is true you can see from the back of the indictment that it charges Price, Haas and Holmes, that it is not endorsed at all by the foreman of the Grand Jury, nor with the names of the witnesses, but there is attached to it a separate and different piece of paper which purports to be an endorsement against Price, Haas and Peckham; therefore, this proceeding must fall. You cannot remove him to the District of Columbia to be tried on an indictment which does not exist.

Mr. DORR: The authentication shows that that is the form
36 in which the indictment does exist in the District of Columbia. When I spoke of the stenographer's error it was not the stenographer's error in making up the authenticat- copy, but in the preparation of the back of the indictment. Whether that back is a part of the indictment at all is a question for the court in which it was found, a matter of practice in the District of Columbia and not a matter of practice here in this district. I take it that probably the back of the indictment is no part of the indictment itself. Anything can be written on the back. The names can be omitted entirely.

Mr. FULLER: If you say the back of the indictment is no part of the indictment then that indictment with the names of Price, Haas and Holmes has no endorsement of the foreman's name whatsoever and no endorsement of the witnesses.

Mr. DORR: I will qualify that as to the endorsement of the witnesses; I don't think that that is a necessary part of it. It certainly is not in this district. The witnesses are never endorsed on the back of the indictment. If they were endorsed it would be regarded as mere surplusage. As to the endorsement either on the body
37 of the indictment or some paper made a part of it, is the endorsement of the foreman. Such an endorsement appears. The mere title on the back I would be prepared to argue is not a formal part of the indictment; that is, it might be treated just as the particular endorsement of witnesses, or the endorsement of anything else on the back of that paper. It is a technical matter which must be determined in the court in which this indictment now is outstanding.

Mr. GANS: Just consider this thing in this manner. What makes an indictment? It is not the drawing of the paper in the District Attorney's office; otherwise we might as well abolish the Constitution. It is not the fact that that paper has been laid before the Grand Jury; otherwise we might just as well abolish the amendments to the Constitution. That which makes the indictment is that formal

act of the Grand Jury deciding that they will charge somebody with a crime, and with a specific crime. Now what is the evidence that the Grand Jury has acted? If the Grand Jury had a paper put before it and sends that paper into court, that does not constitute an indictment. When the Grand Jury has voted, it has one way of
38 giving evidence that it has voted and of the way in which it has so voted, and if it has voted to find an indictment, the way of indicating that fact and indicating which indictment it has found is to have the foreman endorse upon an indictment his name and the words "A true bill." Now then, the only thing that we have here is an endorsement upon a paper against Price, Haas and Peckham. Now that shows that the Grand Jury were prepared to find an indictment against Price, Haas and Peckham, but it does not show that the Grand Jury were prepared to find an indictment against Price, Haas and Holmes, or that they had found any such indictment.

Decision reserved.

Indictment No. 26088 marked Exhibit 1 of this date.

Mr. DOBB: I offer in evidence the authenticated copy of an indictment found in the Supreme Court of the District of Columbia No. 26089, in which Theodore H. Price is named as a defendant for conspiracy to commit an offence against the United States.

Mr. GANS: We object to that indictment on the same grounds as already proffered to the admission of the first indictment, except the ground relating to discrepancy between the endorsement and the matter charged in the indictment, and we make each and every one of those objections.

39 Objection overruled. Exception.

Marked Exhibit 2 of this date

Mr. DOBB: I offer in evidence authenticated copies of two bench warrants issued against Theodore H. Price on indictments Nos. 26088 and 26089 respectively, together with the Marshal's return "Not found" endorsed thereon.

Mr. GANS: We object to the admission of these papers on the ground that no foundation for their admission is laid in the complaint, which is the initial pleading in this action, and that in the absence of any foundation for their admission by an allegation in the complaint that such bench warrants have been issued they may not be admitted in evidence.

On the further ground that it is attempted to join two proceedings by the production of two alleged indictments and two alleged bench warrants, and that the Commissioner is compelled to proceed separately upon each indictment and each bench warrant.

On the further ground that there is not sufficient evidence that the bench warrants have been issued on the basis of the alleged indictments annexed to the complaint.

On the further ground that there is not sufficient evidence that the papers produced are in fact copies of bench warrants issued by the Court.

40 Objection overruled. Exception.

Marked Exhibits 3 and 4 of this date.

Mr. GANS: Will the Commissioner permit me to go back to the objection I made to the second indictment that was offered in evidence? I failed to make with respect to the offer of that indictment the objection that there is no endorsement upon the paper offered as an indictment if the foreman of the Grand Jury purporting to establish that the indictment was found.

The COMMISSIONER: Doesn't it say true bill there?

Mr. GANS: It does say "A true bill" on a sheet of paper; that is annexed to it, but the District Attorney's attitude has been that that sheet of paper is no part of the indictment.

The COMMISSIONER: Yes; but that has been certified to by the clerk of the Court that it is a copy of a paper on file, and the copy on file must have had "A true bill on it."

Mr. GANS: My point is the Government cannot blow hot and blow cold—that this sheet is a part of the indictment and that it is not. We take him at his word as far as this is concerned, and if it is not there is no endorsement on the indictment.

41 Mr. DORR: The Government stated that the true bill was part of the indictment, that is, that was an endorsement by the Grand Jury referring to the papers, in this paper which is attached to them and on which the endorsement of a true bill was put. What else appears on this paper on which the foreman wrote a true bill may or may not be so. That is — point for the court in which the indictment was found to determine, and is a technicality and one which can be only properly settled in the District of Columbia.

Mr. FULLER: Does the District Attorney now maintain that the sheet which bears the endorsement is a part of the indictment or not?

Mr. DORR: I think my position has been made clear by the statement I have given to the stenographer. If it is not clear to the Commissioner I shall be very glad to repeat it.

Mr. FULLER: I would be very glad if the Commissioner would ask the District Attorney to answer that question and get it straight. If that is part of the indictment then this is part of the indictment.

The COMMISSIONER: There is what purports to be an indictment and certified by the clerk of that court.

42 Mr. GANS: Now, don't you beg the question Mr. Commissioner! Here is a paper, to be sure, that is certified by the clerk of the court, and in a certificate in which he describes it as a true copy of the original on file, but that does not bind you to hold that it is an indictment. Supposing the clerk of that court had put a writ of *habeas corpus* in the back and had sent on his certificate that this was a true copy of an indictment on file in the District of Columbia, you wouldn't find that the thing he was presenting to you was an indictment, or one that had been found by a Grand Jury, because you would know it wasn't. That cannot be any clearer than the position you have here. So the Grand Jury has said about as clearly as it could say we have not found an indictment against Price, Haas and Holmes; we have, if you please, found an indictment against Price, Peckham and Haas and that indictment is not produced.

The COMMISSIONER: It all narrows itself down after all to the

question of the indictment, and that indictment—the context of that indictment—says there is a charge of conspiracy against Price, Haas and Holmes and Peckham is eliminated altogether from that indictment as I understand it, while on the endorsement of the in-
43 dictment Peckham's name is put in and somebody else's name is left out.

Mr. GANS: We admit that the gentleman who has been arrested is Mr. Theodore H. Price of the City of New York, but we haven't any means of knowing anything further on the subject.

Mr. DORR: You do not admit that he is the person mentioned in the complaint or in the indictment?

Mr. GANS: No; but we admit he is Mr. Theodore H. Price.

Mr. DORR: You don't admit he is the person mentioned in the indictment?

Mr. GANS: No. We are perfectly ready to admit he is Theodore H. Price of the City of New York.

The COMMISSIONER: The question is whether you admit the Theodore Price here mentioned is the person charged in the indictment.

Mr. GANS: No.

The COMMISSIONER: You don't admit on either indictment?

Mr. GANS: No.

44 WALTER S. MAYER, being first sworn, testified as follows:

Examined by Mr. DORR:

Q. Mr. Mayer, you are one of the United States Post Office inspectors?

A. I am.

Q. You are the Post Office Inspector in charge in the City of New York?

A. I am.

Q. Have you at any time within the last two years been detailed by the Postmaster General to assist in your official capacity in the investigation of the so-called cotton leak matter, that is, the alleged giving out of information as to cotton crop reports in advance of their official publication, and of the falsification of those reports by Government employés in pursuance of an agreement with persons not in the Government service?

Mr. GANS: I object to that, if your Honor please, on the ground that it is immaterial, incompetent and irrelevant; on the further ground that it calls for hearsay; on the further ground that it calls for the conclusion of the witness, and I desire to say with respect to it specifically that it does not make a precious bit of difference what he has been assigned to by the Government; what his official functions are, or for what purpose he was assigned anything by
45 the Government. There is just one question here, and that is whether the gentleman now before the court is the person designated by an indictment, and Mr. Mayer's assignments to duty have nothing whatever to do with that question.

Objection overruled. Exception.

A. My answer is, I have.
Q. Do you know the defendant Theodore H. Price?
A. I do.

Mr. GANS: Object to that, if your Honor please, simply on the ground—if he asks whether he knows the gentleman here in court here is Theodore Price, I have no objection to that. He asked whether he knows the defendant Theodore Price, and I don't want any misconception on that ground because that is an assumption. If he will say does he know the defendant in the removal proceeding——

Mr. DORR: I did do that. The defendant is here in court now.
Mr. FULLER: We don't admit it.
Mr. GANS: If you ask him does he know the man here in court to be Theodore Price I have no objection. May I have the previous answer stricken out?
The COMMISSIONER: Withdraw that question and put another.
Mr. DORR: I will add this:

46 Q. Indicating the defendant in the removal proceeding.

Mr. GANS: I have no objection to his asking does he know the gentleman here in court.
Objection overruled. Exception.
(Question read with the addition by Mr. Dorr.)

Q. Indicating Mr. Price, the defendant before the court?

Mr. FULLER: I object. The District Attorney is assuming to testify himself. There is no evidence of the fact that this gentleman is the defendant in this proceeding.
Mr. ROCKWOOD: Does he testify that the Theodore H. Price now in court is the defendant in this proceeding? Will he go to that extent?
(Question read.)
Objection overruled. Exception.

A. I do.
Q. How long have you known him?
A. During the present year. Since last Spring.
Q. Mr. Mayer, I ask you to look at Government Exhibit No. 1 of this date——
A. Yes.
Q. State whether you know the Theodore H. Price referred to in the paper that you have in your hand——

Mr. GANS: Objected to, if your Honor pleases. He holds in his hand a paper which purports to be a copy of an indictment
47 of a Grand Jury, and he is asked to state whether he knows the Mr. Price in court to be the person referred to in that paper.
Mr. DORR: I didn't ask that question.
Mr. GANS: Maybe I mistook the question.
(Question read.)
Mr. GANS: I object to that. It matters little whether the form is one or the other. That paper purports to be the finding of the Grand

Jury. The Grand Jury has found that some gentleman by the name of Theodore H. Price did certain things. No one can know who the Grand Jury designated or who the Grand Jury had in mind, which of the various Theodore H. Prices, if there are other Theodore Prices they intended to charge with that crime, except the Grand Jury themselves. Mr. Mayer has no more basis for knowledge on the question of what the Grand Jury intended than I have, than you have.

Objection overruled. Exception.

Mr. GANS: Let the objection be that the question calls for a matter that is incompetent, immaterial and irrelevant, calls for the conclusion of the witness on a matter as to which he can by no possibility have knowledge, and as to which, upon the evidence before the Court, it is affirmatively proved that he has no knowledge.

18 The COMMISSIONER: Now answer Mr. Mayer.

(Question read.)

Mr. GANS: And before he answers may I have the opportunity to cross-examine him as to the basis of his knowledge?

The COMMISSIONER: No. Go on and ask the question.

Mr. GANS: Note that I have requested an opportunity to cross-examine as to the basis of the knowledge called for that the opportunity has been denied me and I take an exception.

(Question read.)

A. I do.

Q. What Theodore H. Price is it?

Mr. GANS: I object to that.

Objection overruled. Exception.

Mr. GANS: The objection is on the same ground as the previous question.

A. The same Theodore H. Price who is present in this room.

Q. The same person that you identify as Theodore H. Price who is the defendant in this removal proceeding?

49 Mr. GANS: Objected to on the same grounds as heretofore made, and on the further ground that it is leading.

Objection overruled. Exception.

A. The same person.

Q. Will you examine Government Exhibit 2 of this date, and state whether you know the Theodore H. Price referred to in that paper that you have in your hand, Government Exhibit 2 of this date?

Mr. GANS: I make the same objection as heretofore made to the same questions.

Mr. ROCKWOOD: And we further ask the privilege of examining the witness as to his knowledge, he having said that he only knows Price for a year, and the conspiracy in question going back to the year 1905, it therefore being apparent from the statement of the witness and the record he holds in his hand that he could not have known Price at the time the alleged conspiracy is said to have been entered into. We therefore ask permission to examine the witness

as to the source of his knowledge and acquaintance with Price before this proceeding goes any further.

Mr. DORR: I take it that that is immaterial at this time. I simply asked whether he knows the Theodore H. Price named in that
50 indictment.

Mr. ROCKWOOD: We have an absolute legal right to that examination, the denial of which is not only prejudicial to the defendant, but it also prevents him from presenting the true facts of the case to your Honor.

The COMMISSIONER: Why cannot you do that on cross-examination?

Mr. ROCKWOOD: They may go too far by that time.

Objection overruled. Exception.

(Question read).

A. I do.

Q. What Theodore H. Price is it?

Same objection, ruling and exception.

A. The same Theodore H. Price who is present in this room.

Q. The person you previously identified?

A. It is.

Same objection, ruling and exception.

Cross-examination by Mr. GANS:

Q. Mr. Mayer, you say you have known Mr. Price a year or less?

A. Less than a year.

Q. Where does Mr. Price reside; do you know?

A. I do not. New York City, I know that.

Q. You know he resides in New York City. Have you seen him in New York City on various occasions during this year?

A. Yes.

51 Q. I suppose your acquaintance with him is not a social acquaintance?

A. Entirely official.

Q. And you have met him on only three or four occasions I presume, officially?

Mr. DORR: I object to any questions by which it is sought to adduce the result or scope of Mr. Mayer's investigations in this matter.

Mr. GANS: Don't shout before you are hurt. All I am asking is whether he has seen him on three or four occasions.

Mr. DORR: I object to going into the question at all. You expressly stated in your question, how many times have you seen him in your official capacity.

Mr. GANS: I suppose if a witness undertakes to identify somebody, even an ordinary identification, I can ask him what opportunities he has of knowing.

The COMMISSIONER: I think that has been laid down pretty well in the Beavers case. The question is inadmissible.

Exception taken.

Q. On how many occasions have you met him in your official capacity?

Mr. Dorr: I object to that.

Objection sustained. Exception.

52 Q. Mr. Mayer, were you before the Grand Jury in the District of Columbia at the time when they were deliberating as to whether they should find an indictment or not; I don't mean by that whether you were called as a witness by the Grand Jury?

Objected to. Objection sustained.

Exception taken.

Mr. Gans: Just let me indicate the purpose of this question, then we will except to the ruling. This gentleman has purported to translate what is in the minds of the Grand Jury. He has told us that an indictment which the Grand Jury found and in which they said that they meant Mr. Theodore H. Price indicated that they meant this Mr. Theodore H. Price. I desire to find out how he knows. There is only one way in which he could know and that is if he were sitting there in the Grand Jury room and listening to their discussion and knew at that time——

The Commissioner: He wouldn't be allowed there during their discussions. I sustain the objection.

Exception taken.

Mr. Gans: Now, then, sir; on the basis of the evidence that has been adduced by Mr. Mayer that he has known Mr. Price
53 for a year, and a year only; and on the basis of the fact that it must be assumed that he was not before the Grand Jury at the time, since your Honor has ruled out the question by which we tried to establish that he was not, that it is therefore affirmatively established that he has no basis for the knowledge as to which he has been asked to testify, that he has been testifying merely to his own conclusions, and that therefore his testimony is immaterial and irrelevant to the issue and should be stricken out.

Mr. Dorr: This same objection was made in the Beavers case where exactly the same line of proof was followed by the Government, which case has been sustained by the Supreme Court. There the Post Office Inspector who had charge of the inspection, as in the case here, was asked exactly the same questions with only the change in the name of the defendant, and gave substantially the same replies, and the same objections were made on the ground that it calls for a conclusion and the objection was overruled and the identity was held to be established and the Supreme Court sustains the case.

Mr. Gans: Does your Honor refuse to strike out the testimony?

The Commissioner: Yes.

Exception taken.

54 Q. Mr. Mayer you were not a member of the grand jury which is purported to have found these indictments?

A. I was not.

Q. Mr. Mayer you have given us all your official functions haven't you when you told us that you were associated with the Post Office Department as chief inspector or have you other official duties?

A. As explained by Mr. Dorr in his question.

Q. You were not an assistant District Attorney at the time these alleged indictments were being considered?

A. No, sir.

Q. And you were not a District Attorney?

A. No, sir.

Q. You were not an official of the Department of Justice?

Mr. DORR: I object to that as it involves a conclusion of law.

The COMMISSIONER: He don't know. He is just testifying inspector; whether he is connected with the Department of Justice is no matter.

Q. Are you an attorney and counselor at law?

A. No, sir.

Q. Admitted to the bar anywhere?

A. No, sir.

Q. You have never received an appointment from the Government to a position which is required to be held by an at-
55 torney?

A. No.

Mr. DORR: I object to it.

The COMMISSIONER: It is answered.

Q. Are you a stenographer?

A. No, sir.

Q. You never served as a stenographer?

The COMMISSIONER: How is that material?

Mr. GANS: I want to know if he was before the grand jury as a stenographer.

The COMMISSIONER: He is not a stenographer.

Mr. DORR: I object on this ground that he cannot get indirectly at what he cannot get at directly.

Q. Did you serve the grand jury in the District of Columbia at any time as an official stenographer?

Mr. DORR: Objected to.

Objection sustained.

Mr. GANS: Your Honor rules that I may not show that he was not the official stenographer of the District of Columbia Grand Jury sitting in the District of Columbia?

The COMMISSIONER: He says he is not a stenographer and I wouldn't allow him—he can answer the question.

A. Of the District of Columbia, no, or anywhere else.

Q. At any time?

A. No, sir.

56 Mr. GANS: Just one thing more. First, I move to strike out the testimony of this witness again on the ground that it now appears that he was in no position in which he could have any knowledge of the person who was intended by the Grand Jury in the alleged indictment; the additional ground of my motion to strike

out is that it now appears that he was not an assistant District Attorney, not a stenographer before the Grand Jury and it must be assumed that he was not present before the Grand Jury during their deliberations, and it therefore appears that he has no basis of knowledge.

Motion denied. Exception.

Q. Do you know Mr. Mayer whether there are any other Theodore Price's in the City of New York?

A. I don't.

Q. Have you ever looked at the City Directory?

A. I have not.

Q. Will you look at it now?

The COMMISSIONER: How many are there?

Mr. FULLER: There are four Theodore Price's there.

The WITNESS: I find only one.

Q. Theodore Price's?

A. Theodore H. Price.

57 Mr. GANS: I move that the answer be stricken out. I asked whether he saw more than one Theodore Price there in the directory.

Mr. DORR: I object to that as irrelevant and incompetent.

The COMMISSIONER: You can answer the question.

A. There are four in the City Directory of New York in 1906 I don't know how many there are now.

The COMMISSIONER: How many are there now?

Mr. FULLER: Two.

(By Mr. FULLER:)

Q. Now Mr. Mayer will you look at the Directory for 1908 and see how many persons there are named Theodore Price?

Mr. DORR: Objected to on the same ground, as immaterial, how many Theodore Prices there are.

Mr. GANS: It is a familiar rule that a middle initial is not a component part of a man's name.

The COMMISSIONER: How many are there?

The WITNESS: Two.

(By Mr. DORR:)

Q. How many Theodore H. Prices are there?

A. One Theodore H., and Theodore N. in 1908; there are four Theodore Prices in 1906.

Mr. GANS: We renew our motion to strike out.

58 The COMMISSIONER: Do you want to submit anything on the question you raise. I will let it stand.

Exception taken.

Mr. ROCKWOOD: I suggest your Honor might reserve decision on this point of identity as to whether or not a man can identify a defendant who has only known him a year when the crime charged is alleged to have occurred three years ago.

The COMMISSIONER: That can be done in some ways. I might know a man and you and he might have made a statement to me of something that occurred four years ago.

Mr. ROCKWOOD: You have overruled it?

The COMMISSIONER: Yes, and give you an exception.

Mr. DORR: I offer in evidence as further evidence of identity——

WILLIAM H. LEARY, being first sworn, testified as follows:

Direct examination by Mr. DORR:

Q. You are a Deputy Clerk in the United States Circuit Court?

A. I am.

Q. Have you produced certain papers from the files of the United States Circuit Court in the matter of the United States of
59 America against Theodore H. Price?

A. Yes, sir.

Q. I show you certain affidavits purporting to be signed by Theodore H. Price and ask if this is one of the papers produced from the records of that case?

A. Yes.

Mr. DORR: I offer this affidavit of Theodore H. Price in evidence as an affidavit by Mr. Price that he is under these particular indictments in the District of Columbia.

Mr. GANS: I object to the paper offered on the grou- that it is immaterial, irrelevant and incompetent and I would like to hear what the District Attorney has to say with regard to the competency of an affidavit prepared by Mr. Price——

Mr. DORR: Do you raise the question that the person signing this affidavit is not the Mr. Price in question?

Mr. GANS: No, I won't raise that question.

The COMMISSIONER: I will allow it in on the question of identity and give you an exception.

Mr. GANS: I merely want to state the ground of my objection to it is that at the utmost it must be contended that it is a statement by Mr. Price which in some way or other identifies him with
60 the action of the Grand Jury of the District of Columbia. It is perfectly evident that Mr. Price could not have been before the Grand Jury or in the confidence of the Grand Jury that found these indictments against Theodore H. Price and that therefore even if his words could be construed into a statement that he was the person they would be incompetent as evidence in any Court because he would not have any foundation on which to make the statement.

The COMMISSIONER: What is this affidavit used for. I will allow it in and give you an exception for what it is worth.

Marked Exhibit 5 of this date

Q. I ask you to look at this paper and see whether that is a paper filed in the Circuit Court at the same time as the affidavit which has been offered in evidence?

A. Yes.

Mr. DORR: I offer that affidavit of Mr. Stimson in evidence.

Mr. GANS: Objected to as immaterial, irrelevant and incompetent, and a statement of Mr. Stimson while under oath and is made in form under which he is not subject to cross-examination and therefore inadmissible.

Objection overruled. Exception.

Mr. FULLER: For what purpose is it offered?

61 Mr. DORR: I offer the moving and answering affidavits to show that Mr. Price has admitted and sworn on oath that he is the person named in the Washington indictments mentioned in the moving papers which as appears from the record are the same indictments as have been offered in evidence here to day.

Government Rests.

Mr. GANS: We want to make a motion for a dismissal of this proceeding.

The COMMISSIONER: You have already moved to dismiss it.

Mr. GANS: We want to move again. We want to present that motion formally to you, and this question we raise to this indictment that you have reserved decision on that we want to present to you. You had better set a day for that argument.

Briefs to be submitted and ground for motion to dismiss are to be placed on record on Monday, December 7th, 1908.

Hearing adjourned to Thursday, December 10th, 1908, at 10.30 a. m.

62 UNITED STATES
vs.
THEODORE H. PRICE.

NEW YORK, *December 10th*, 1908.

Hearing resumed pursuant to adjournment.

Appearances: The Commissioner, Mr. Dorr for the Government, Mr. Gans, for the Defendant; Mr. Fuller, for the defendant.

Mr. GANS: Mr. Commissioner, before we start with our affirmative proof in this case, we desire to call attention to the fact that when the alleged indictments were offered in evidence we objected to them on a variety of grounds, including among others that by reason of the endorsement upon them, or upon one of them, it did not appear that the paper purporting to be an indictment and which was contained in the back upon which the endorsement was made had in fact been found by the Grand Jury. We desire to add to the objections which we then made, and to have incorporated in the record the objections which we are now about to make as though they were made at the time.

The COMMISSIONER: There is no objection to that. There are two indictments there.

63 Mr. GANS: Yes sir. Now the objections I desire to add——

The COMMISSIONER: What about the second indictment?

Mr. GANS: I am going to come to that. The objection that we

desire to add is the further one that it does not appear that the indictments which are alleged to have been found by the Grand Jury in the District of Columbia, and which are adduced as the basis of this proceeding, were preceded by a presentment of the Grand Jury authorizing such bills to be found, and that is the practice in the District of Columbia founded upon the law there in force, that indictments must be preceded by the presentments or otherwise they are not valid. And we desire to make this last objection to both the so-called indictments which have been annexed to the record.

The COMMISSIONER: Where did you get that authority?

Mr. FULLER: We will show it to you; it is in the laws of the District of Columbia.

Mr. GANS: The law in force in the District of Columbia requires that an indictment shall not be found without either a presentment or an order of the Court, and the courts of the District of Columbia have so held, that an indictment found without it is void in
64 that district, and we desire a ruling on it and then we will enter affirmative proof with respect to the situation.

Mr. DORR: As to that objection, the point has been directly passed upon by the trial court of the District of Columbia, and they have held in the case of Dr. Leon, who was recently tried and sentenced to a five year term for the crime of abortion, that the absence of the presentment is no bar to the prosecution of the indictment.

Mr. GANS: Is that reported?

Mr. DORR: I don't know if it is reported, but it will appear on the records of the Supreme Court of the District of Columbia, of which you can obtain a certified copy. And further I would call your Honor's attention to the many cases in which removals have been had to the District of Columbia, removals which have been brought right up to the Supreme Court, and none of which had a presentment, as the records of these cases on appeal will show. The issue at point is whether or not an indictment is sufficient evidence to follow this course. The courts have held that an indictment showing the action of the Grand Jury is such evidence.

Mr. FULLER: The indictment has got to be a legal in-
65 dictment.

The COMMISSIONER: There is an indictment.

Mr. GANS: Certainly. As to 26088, the one on which is the difference in the endorsement there is no indictment.

The COMMISSIONER: I will overrule the objection and give you an exception. That should be settled by the Court.

Mr. DORR: I would like to have it mentioned on the record that the District Attorney has called your attention to the case of the United States *vs.* Williams, 168 U. S., in which it was held that the endorsement on the margin of the indictment is no part of the indictment and that an error in that endorsement cannot in any way invalidate the indictment, and to the similar holding of the Circuit Court of Appeals in this district in the Wechsler case, in which, though the endorsement charged the defendant with the commission of the crime of perjury under the section of the Revised Statutes, and though the sentence was imposed under that section, the court

held that the body of the indictment sufficiently charging the offence of making a false oath in a bankruptcy proceeding, that conviction could be sustained on that indictment, and remanded the case for resentence to the Circuit Court under the bankruptcy section.

66 Mr. GANS: That is a different proposition.

Mr. DORR: The court so held that the endorsement on the margin or back of the indictment was not part of the indictment for the purpose of determining its validity. And further, I would call your Honor's attention to Section 1025 of the Revised Statutes which prevents the court from taking advantage of purely technical defects on the form of an indictment. Here is the language in the Williams case: "The endorsement on the margin of the indictment constitutes no part of the indictment and does not add to or weaken the legal force of its averment."

The COMMISSIONER: I will overrule the objection and give you an exception.

Mr. DORR: I may say further, that I am informed by the Deputy Clerk of the Court of the District of Columbia that frequently indictments are there filed without any presentment. Now, this is a matter peculiar it seems to me for the Supreme Court of the District of Columbia to pass upon, as to whether or not this technical defect is important, and whether in fact it is a technical defect at all and not a matter which should be disposed of by a committing magistrate, and should be raised in the district in which the indictment was found, and could not be passed upon by a com-

67 mitting magistrate in another district.

Mr. FULLER: We will sustain all of this by proof.

The COMMISSIONER: I will overrule and give you an exception.

Mr. FULLER: We know of the Williams cases here in 168 U. S., but that is not applicable to that point at all. That is an appeal from California where there is no statute law requiring presentments to be brought.

The COMMISSIONER: They don't put it on that broad ground; they put it on the broad ground that the face of the indictment charges an offence of something else which may be on the back of the indictment.

Mr. FULLER: We have a case here on an entirely different state of facts and on entirely different questions of law.

Mr. DORR: The attorneys for the defense have stated that there is a law requiring a presentment in the District of Columbia ——

Mr. GANS: We will argue that when we put our proof in.

Mr. DORR: I should like to have an opportunity to argue that point.

68 Mr. GANS: Now I move to dismiss the proceedings and for an order discharging Mr. Price from custody on the following grounds:

1. Because the complaint does not set forth facts sufficient to confer jurisdiction.

2. Because the proceeding is founded on a complaint which does not aver that a Bench Warrant was issued for the apprehension of

the accused, and which therefore affords no jurisdiction to proceed with the proceeding or to direct the removal.

3. Because the complaint is defective in that it joins two charges based on separate alleged indictments.

4. Because the papers annexed to the complaint and referred to therein as copies of indictments are not sufficiently proved to be such and are not evidence of any of the facts purporting to be alleged therein.

5. Because it appears on the face of the papers annexed to the complaint and alleged to be copies of indictments that they do not charge that any crime has been committed against the United States.

6. Because each count of the said alleged indictments is bad and insufficient to establish cause to believe the accused
69 guilty of any crime.

7. Because the several counts of the said alleged indictments are bad for the following reasons:

The first count of indictment No. 26088 is bad

(*a*) Because it attempts to charge a conspiracy to defraud the United States, and in stating the object of the conspiracy, sets forth matter which does not constitute a fraud on the United States, since the matter to be affected was not money or property or other substantial interest of the United States.

(*b*) Since it contains no allegation that the conspiracy contemplated that Price and Haas would, at the time of the divulgence to them of the matter referred to, be persons unauthorized to receive the said information.

The second count of indictment No. 26088 is bad

(*a*) For uncertainty, in that it attempts to charge a conspiracy as having been committed continuously over a period of nearly five months.

(*b*) For multiplicity, since it charges an act of conspiring on the 15th day of November and an overt act on the 20th day of November, which would render one charge of conspiracy complete, then further charges an act of conspiring after the 20th day of November and that another overt act was performed on the 31st day of May, 1905, whereby another separate charge of conspiracy is made, and since it further charges an act of conspiring on the 1st day of June, 1905, and an overt act on that day, which would constitute a third separate conspiracy, and since it charges an act of conspiracy on the 2nd day of June, 1905, and an overt act on said day, which would constitute a fourth separate conspiracy.

(*c*) Because it attempts to charge a conspiracy to defraud the United States and in stating the object of the conspiracy sets forth matter which does not constitute a fraud on the United States,
70 since the matter to be affected was not a money, or property, or other substantial interest of the United States.

(*d*) Since it contains no allegation that Price and Haas were not, during the times referred to in the count, officers of the department.

The third count of indictment No. 26088 is bad

(*a*) Because without incorporating into it the matter set forth in

the second count, the facts set forth in the third count are insufficient to constitute any offense, or to apprise a defendant of that which he is to meet, and the matter set forth in the second count may not be incorporated in the third, because the attempted reference thereto is not sufficiently clear and definite, in that it requires the defendant to determine *of* process of inference and conclusion that which is intended to be incorporated.

(*b*) Because it attempts to charge a conspiracy to defraud the United States and in stating the object of the conspiracy, sets forth matter which does not constitute a fraud on the United States, since the matter to be effected was not a money, or property, or other substantial interest of the United States.

(*c*) Because it fails to allege that the alleged conspiracy was
71 formed at the District of Columbia or at any other place.

(*d*) Because it does not charge that the conspiracy contemplated any conscious inaccuracy in the report to be made by Holmes and because it is consistent with the averments of the count that the inaccuracy which was to result was to be brought about by some system of computation honestly and in good faith, though erroneously to be adopted.

(*e*) Because there is no allegation that Price and Haas were not officers of the department and hence no allegation of any conspiracy to do anything wrong in procuring the disclosure to them.

The fourth count of indictment No. 26088 has been withdrawn from the complaint, and upon that count the defendant may therefore not be removed.

The fifth count of indictment No. 26088 is bad

(*a*) Because without incorporating into it matter set forth in the second count, the facts set forth in the fifth count are insufficient to constitute any offense or to apprise a defendant of that which he is to meet, and the matter set forth in the second count may not be incorporated in the fifth, because the attempted reference thereto is not sufficiently clear and definite, in that it requires the *the* de-
72 fendant to determine by process of inference and conclusion that which is intended to be incorporated.

(*b*) Because it attempts to charge a conspiracy to defraud the United States and in stating the object of the conspiracy, sets forth matter which does not constitute a fraud on the United States, since the matter to be effected was not a money, or property, or other substantial interest of the United States.

(*c*) Since there is no allegation that Price and Haas were not members of the department, hence no allegation that they were not entitled to have the advance information, hence no element of corruption in a scheme whereby they were to use that information in a joint venture with Holmes for the mutual advantage.

The sixth count of indictment No. 26088 has been withdrawn and hence furnishes no ground for removal.

The seventh count of indictment No. 26088 is bad

(*a*) Because without incorporating into it the matter set forth in the second count, the facts set forth in the sixth count are insufficient to constitute any offense or to apprise a defendant of that which he is-

to meet, and the matter set forth in the second count may not be incorporated in the sixth, because the attempted reference
73 thereto is not sufficiently clear and definite, in that it requires the defendant to determine by process of inference and conclusion that which is intended to be incorporated.

(*b*) Because it attempts to charge a conspiracy to defraud the United States and in stating the object of the conspiracy, sets forth matter which does not constitute a fraud on the United States, since the matter to be effected was not a money, or property, or other substantial interest of the United States.

(*c*) Because it does not appear that the alleged conspiracy was entered into in the District of Columbia or at any other place.

(*d*) Because it does not appear that Price and Haas were not members of the department.

(*e*) Because it does not appear that there was contemplated any wilful or conscious inaccuracy in the report to be made.

The eighth count of indictment No. 26088 has been withdrawn from the complaint, and is not a basis for removal.

The first count of indictment No. 26089 is bad

(*a*) Because it fails to allege that Price and Haas were not members of the department, and hence fails to set out any facts tending to show that the agreement characterized as conspiracy con-
74 templated the doing of anything by Holmes which would be in dereliction of his duty, and since the conspiracy sought to be charged is a conspiracy to commit the offense of promising Holmes a sum of money to induce him to commit acts in violation of his lawful duty, the charge must fail when it appears that there is nothing in the indictment to show that the acts which *is* was contemplated he should do were to be in violation of any duty.

(*b*) Because the offense sought to be charged as the object of the conspiracy is bribery, and in order to allege bribery, it is essential to charge a corrupt intent as accompanying the bribe, or the offer of the bribe, and there is no such allegation.

(*c*) Because in order to charge bribery it is essential that it should appear definitely that the matter offered is a thing of value, and the allegation that the offer was to be a sum of money, the amount of which is to the Grand Jurors unknown, is too indefinite to make it certain that it was contemplated that anything of value should be offered.

(*d*) Because the allegations are repugnant in that while it was alleged that the conspiracy contemplated the giving of a sum of money to the Grand Jurors unknown, it appears by overt act
75 No. 7 that it was known to the Grand Jury that the conspiracy contemplated the giving of a definite sum of money, to-wit, the sum of one thousand dollars.

(*e*) Because an agreement between "A" and his agent to offer a bribe to "B", while it may suffice to charge "A" and the agent with the crime of bribery, if bribery be committed or attempted, does not suffice for a charge of conspiracy.

(*f*) Because it appears that if any crime were attempted to be committed, it was the crime of bribery, that the acts set forth in the

indictment constitute the pleaded crime, if any, and that hence the conspiracy has merged in the pleaded offense.

The second count of indictment No. 26098 is bad

(*a*) Because without incorporating into it the matter set forth in the first count, the facts set forth in the second count are insufficient to constitute any offense or to apprise a defendant of that which he is to meet, and the matter set forth in the first count may not be incorporated into the second, because the attempted reference thereto is not sufficiently clear and definite, in that it requires the defendant to determine by process of inference and conclusion that which is intended to be incorporated.

76 (*b*) Because it does not charge the offense to have been committed at the District of Columbia, or at any other place.

(*c*) Because it fails to allege that Price and Haas were not members of the department and hence fails to set out any facts tending to show that the agreement characterized as conspiracy contemplated the doing of anything by Holmes which would be in dereliction of his duty, and since the conspiracy sought to be charged is a conspiracy to commit the offense of promising Holmes a sum of money to induce him to commit acts in violation of his lawful duty, the charge must fail when it appears that there is nothing in the indictment to show that the acts which it was contemplated he should do were to be in violation of any duty.

(*d*) Because the offense sought to be charged as the object of the conspiracy is bribery, and in order to allege bribery it is essential to charge a corrupt intent as accompanying the bribe, or the offer of the bribe, and there is no such allegation.

(*e*) Because in order to charge bribery, it is essential that it should appear definitely that the matter offered is a thing of value, and an allegation that the offer was to be a sum of money, the amount of which is to the Grand Jurors unknown, is too indefinite to make it certain that it was contemplated that anything of value

77 should be offered.

(*f*) Because the allegations are repugnant in that while it is alleged that the conspiracy contemplated the giving of a sum of money to the Grand Jurors unknown, it appears by overt act No. 7 that it was known to the Grand Jury that the conspiracy contemplated the giving of a definite sum of money, to wit, the sum of one thousand dollars.

(*g*) Because an agreement between "A" and his agent to offer a bribe to "B", while it may suffice to charge "A" and the agent with the crime of bribery, if bribery be committed or attempted, does not suffice for a charge of conspiracy.

(*h*) Because it appears that if any crime were attempted to be committed, it was the crime of bribery, that the acts set forth in the indictment constitute the pleaded crime, if any, and that hence the conspiracy has merged in the pleaded offense.

(*i*) Because it does not appear that the inaccuracy in the report which was contemplated was to be a conscious or wilful inaccuracy.

8 Because there is no evidence of any kind or character to sustain

a finding that there is probable cause to believe the accused
78 guilty of any crime against the United States.

9. Because it does not appear that the alleged indictments upon which the proceeding is founded, were in fact directed to be drawn by the Grand Jury.

10. Because it does not appear that the said alleged indictments were preceded by presentments of the Grand Jury as is required by law.

11. Because it appears affirmatively that the alleged indictment numbered 26088 was not found by a Grand Jury.

12. Because it appears affirmatively that the Grand Jury had directed that an indictment be drawn charging a conspiracy between Theodore H. Price, Moses H. Haas and Frederick A. Peckham, charging a conspiracy to have been entered into between them; that such instructions were disregarded and a bill was drawn charging a conspiracy to have been entered into between Theodore H. Price, Moses Haas and Edwin Holmes, Jr.; that the Grand Jury declined to find such an indictment, and neither signed the same as a true bill nor filed the same as a true bill; and that the records of the court show that no such bill was filed.

13. Because the indictment numbered 26088 contains no
79 charges of a conspiracy between Theodore H. Price, Moses Haas and Frederick A. Peckham, and it appears by the endorsement on the back thereof that the only true bill attempted to be found was upon a charge of conspiracy against the said three persons.

14. Because there is no sufficient evidence that the Theodore H. Price who is being attempted to be removed is the person named in the alleged indictments, or either or them, and intended to be charged with crime therein.

15. Because it appears affirmatively that the said Theodore H. Price was not in the City of Washington at the time of the formation of the said conspiracy and hence the allegations of the said indictment are completely rebutted.

16. Because it appears that the said Theodore H. Price is held to answer indictments found in the Southern District of New York charging the same offenses to have been committed by him in that district.

17. Because it appears affirmatively that the alleged offenses for which the removal is sought, if committed at all, were committed more than three years prior to the finding of these alleged indictments, and that their prosecution is barred by the Statute of Limitations.

80 18. Because of all the defects heretofore urged on the motion to dismiss the proceedings, and on the objection to the admission of the said alleged indictments in evidence.

The foregoing objections were overruled and exception taken.

81 JAY F. BROWN, being first sworn on behalf of the defense, testified as follows:

Direct examination by Mr. GANS:

Q. Where do you reside?
A. 2018 Eighth St., Washington, D. C.
Q. What is your business?
A. Photographer.
Q. Were you called to go to the clerk's office of the court in the District of Columbia—the Supreme Court of the District of Columbia—some days ago?
A. Yes sir.
Q. And there did you take photographs of certain of the records connected with that court?

Mr. DORR: Objected to as immaterial. I cannot see how this tends to show that Mr. Price did not commit the offence charged in the indictment.

Mr. GANS: We are going to show that no proper indictment was found against him.

Mr. DORR: If it tends to show that the copy received before you is not a true copy of the Washington indictment, then I withdraw my objection.

Mr. GANS: We are going to offer it for the purpose of establishing that it appears by the records of the court in Washington that no such indictment as has here been presented and certified was actually returned into the court.

82 The COMMISSIONER: I will allow the question if that is what you are offering it here for.

(Question read.)

A. I did.
Q. And certain papers?
A. Yes sir.
Q. Do you recognize these photographs that I show to you as the photographs that you then took?
A. I did.
Q. And did you several days later go to the same place and take photographs of other records?
A. I did.
Q. And these that I now show you are the subsequent ones?
A. They are.

Mr. GANS: I offer in evidence separately the two batches.

Mr. DORR: I object. These photographs have no tendency to contradict the evidence offered by the Government on this point; they do not show the inaccuracy of any certified copies of these documents or any authentication of those documents or indictments heretofore offered in evidence, and as incompetent and irrelevant.

Mr. GANS: They cannot do the Government's case any harm and they enable us to present the point we desire to make.

Mr. DORR: Certainly irrelevant and incompetent matter
83 cannot do the case any harm, and there is no reason for burdening the record with it.

The COMMISSIONER: As I understand these are simply photographs of papers——

Mr. GANS: No; there is something more than that.

Mr. DORR: I will object to it as incompetent and irrelevant because it does not tend to controvert anything that the Government put in evidence. The Government might offer it as corroboration of its own case, but certainly it is not competent for the defendant to offer it.

Mr. GANS: If the Government can offer these papers then we can offer them too.

The COMMISSIONER: I will allow them in and give you an exception.

Mr. DORR: I object separately to the alleged presentments in that it is entirely immaterial whether or not the indictments be accompanied by a presentment and that it in no way tends to rebut the evidence offered by the Government that certain indictments are outstanding in the District of Columbia.

Objection overruled.

Photographs marked Exhibits 1 to 7 of this date.

84 Q. I ask you to look at exhibits 4 and 5 and tell me whether or not exhibit 4 is a photograph of the back of a paper of which exhibit 5 is the face?

A. Exhibit 4 is the back and exhibit 5 is the face.

Q. And I ask you to look at exhibits 7 and 6, and tell me whether or not exhibit 7 is a photograph of the back of a paper of which exhibit 6 is a photograph of the front or face?

A. Exhibit 6 is a photograph of the face and exhibit 7 is a photograph of the back.

Q. Exhibit 1 I take it is the photograph of the back of the paper?

A. That is correct.

Q. And exhibits 2 and 3 are photographs of pages of separate books, are they not?

A. Of separate books, yes.

Q. Did you develop the plates yourself?

A. I did.

Q. And took the pictures?

A. I did.

No cross-examination.

85 SAMUEL McC. HAWKEN, sworn on behalf of the defense, testified as follows:

Direct examination by Mr. GANS:

Q. Mr. Hawken where do you reside?

A. I reside in the District of Columbia.

Q. What is your official position, if any?

A. I am and have been for the last five years an assistant clerk in the Supreme Court of the District of Columbia.

Q. Mr. Hawken, I show you a photograph marked Exhibit 3, and ask you to tell us from what record it is made, if any. All I want is the name of the book?

A. That is the photographic copy of a part of the page contained in the criminal minutes 44 of the Supreme Court of the District of Columbia. I am a little in doubt as to whether that is 44, but my impression is it is either 44 or 45.

Q. It is a book of criminal minutes?

A. It is a book of criminal minutes.

Q. And it is the book in which entries are made of any indictments or presentments that are brought before the court?

A. It is the book in which is entered, or are entered, the names of all persons against whom indictments are returned.

86 Q. And the other matters which appear on the record to have been entered there?

A. Beg pardon?

Q. You limited it to the name of the persons against whom indictments were returned?

A. Yes.

Q. I see here other things?

A. I meant to say among other things.

Q. Also it is a book in which entries are made of the charges made?

A. The names of the persons against whom indictments are returned, and the offences charged against those persons and the number of the cases in which the indictments are returned.

Q. Presentments are not entered?

A. Presentments are not entered.

Q. In this particular book or in any book?

A. A notation of the fact that a presentment accompanies an indictment is made on the docket of the court—presentment and indictment filed on such a day, but the fact of the notation, the returning of the indictment is made in the minutes, but not the notation of the presentment which accompanied the indictment.

Q. Mr. Hawken, on Exhibit 3 of this date there appears a record as follows: "The Grand Jury comes into court and *and* pres-

87 ents indictments, each endorsed thereon a true bill against." and then there are several entries, and we come now to one opposite a number, 26088, which reads as follows: "Theodore H. Price, Moses Haas and Edwin S. Holmes, Jr.," the words "Edwin S. Holmes, Jr." being written between the lines, and underneath, and on the line, the words "Frederick A. Peckham." Opposite these names appears No. 26088 with ditto marks, and opposite also appears as a description: "For conspiracy to defraud the United States and to commit an offence against the United States." Now, I want to ask you with regard to this interlineation and the striking out of the name "Frederick A. Peckham," and ask if you know who did it?

Mr. DOBB: Objected to as incompetent. The proceeding is not against either Frederick A. Peckham or Edwin S. Holmes, Jr., and here is a record which shows an indictment found against Theodore H. Price and shows the charge; it is entirely immaterial.

Mr. GANS: I am asking about this interlineation. I have a right to show how a record of a court has been altered.

Mr. DORR: But not a record which does not relate to Theodore H. Price.

88 Mr. GANS: This very alleged indictment on which he is sought to be removed——

Mr. DORR: The Government here shows that Theodore H. Price was indicted, and shows the offence for which he was indicted, and there is no irregularity upon the face of it anywhere as to Theodore H. Price. I object to the question on that ground, and as immaterial, irrelevant and incompetent.

Mr. GANS: Edwin S. Holmes has been written in and Frederick A. Peckham struck out. I want to find out who did it and when it was done. I do not intend to impugn the intentions of the gentleman who made this change or to suggest that there was any intentional impropriety on his part but I want to establish merely the facts as to how it was done.

Mr. DORR: I object to that on the ground as I stated before, that it is entirely immaterial whether any change was made in the record of Holmes, Jr. or Frederick A. Peckham; in fact it does not appear from the record any change has been made; the name has been written down and maybe improperly stricken out, but it has no relation to Theodore H. Price; there is no alteration in regard to his name.

Mr. GANS: I think this is the most startling attitude the
89 District Attorney's office has ever taken. Here we are engaged in a proceeding endeavoring to establish certain facts about a record, showing that the record of indictment found against us has been altered, a most serious situation. Now the District Attorney comes into court and says that he is going to block an attempt to show those records were altered on the theory that they do not affect us. We say they do affect us for this reason, that conspiracy is a joint crime; one man cannot commit it; a conspiracy between A, B and C is a different thing from a conspiracy between A, C and D. Now, if the Grand Jury had intended to indict A, D and C, that does not authorize the District Attorney to put in a bill before them to indict A, B and C and procure them to sign that as a true bill, whether he does it as intention, subterfuge or as matter of mistake.

The COMMISSIONER: Mr. Dorr's point is that that might perhaps be a good objection to raise as to this man Peckham, but how does it affect Price?

Mr. GANS: It affects Price this way: If the Grand Jury had intended, if you can spell out an intention of the Grand Jury to indict Price for a conspiracy between Peckham and Haas, that does not
support an indictment that Mr. Price conspired with Peck-
90 ham and Holmes. Now, the Grand Jury has got to determine who the people are.

Mr. DORR: And that Grand Jury has determined that by the record before you, by that indictment before you, which is presented by them as a true bill and signed with the signature of the foreman to that effect; what constituted the charge against this man Price

appears upon the face of the indictment which is offered here in evidence.

The COMMISSIONER: Make your offer and ——

Mr. FULLER: Just a second, if your Honor please. The photograph is a photograph of a page of the court records in the Supreme Court of the District of Columbia, the jurisdiction in which this alleged indictment was returned. Now, if your Honor will listen to the language: "The Grand Jury comes into court and presents indictments, each endorsed thereon a true bill against" the following parties. Now, if your Honor please, that is the official record of the court.

The COMMISSIONER: You have got that in.

Mr. FULLER: Now we want to show why that official record ——

The COMMISSIONER: I have allowed you to put that in.

91 Mr. GANS: The record being in, what we want to show is how those interlineations came about.

Mr. DORR: That has nothing to do with Price.

Mr. GANS: It certainly has.

Mr. DORR: His name appears as one of the defendants in the indictment.

The COMMISSIONER: I cannot see what harm will arise from letting him testify to it.

Mr. DORR: It is not that the Government fears any thing that this investigation will show, but this hearing before the Commissioner is going into matters purely irrelevant and immaterial.

The COMMISSIONER: I will let him ask this one question and then stop him, but if this gentleman knows how that happened I will allow it.

Q. Mr. Hawken, do you know who made this change in the record?

A. I do sir.

Q. You did it yourself?

A. I made it.

Q. Do you know when the change in the record was made?

A. Yes. Those indictments were returned on May 29, 1908, and in entering them, the names of those against whom the in-

92 dictments purported to be ——

Q. I asked when you made them?

The COMMISSIONER: Go on and give your answer.

Mr. GANS: I object to it as irresponsive. Exception.

The COMMISSIONER: I will allow it to be answered.

A. (Continuing:) Returned. I followed the caption endorsed on the back of the indictment. On June 1st, the next day after the 29th and the 30th, which was a legal holiday, and the next day was Sunday — on the next day, Mr. Lester of counsel for Holmes, came into court and asked me to let him see the records, which I did. After looking at the records he said that he was surprised that there was only one indictment ——

Mr. GANS: I object to a statement by Mr. Lester.

The COMMISSIONER: That is the statement; it is in now.

Mr. GANS: I make an objection to the statement of a third party as hearsay.

The COMMISSIONER: You have asked about it and I will allow it.

A. (Continuing:) Mr. Lester expressed surprise that there was only one indictment against Holmes, and he said that from
93 the indictment, or from the papers, he had gathered that there were two indictments, that Holmes had been indicted with Price, and asked me to let him see the original indictment; I got him the original indictment and after examining that he said, why, here it is. He says, while the name of Peckham——

Mr. GANS: We object.

The COMMISSIONER: The Commissioner states that counsel for the defendant Mr. Price wishing to find out how this alteration or erasure, whatever it was, was made, I have under objection allowed this witness to answer the question and I propose to take his answer in full.

Mr. GANS: Hearsay or no?

The COMMISSIONER: It is all hearsay.

Mr. GANS: We have not asked for hearsay.

The COMMISSIONER: You asked how that alteration was made, didn't you?

Mr. GANS: No; if the Commissioner will pardon me——

Mr. FULLER: We asked who made the alteration and when it was made.

The COMMISSIONER: And he is telling you when it was made and how.

94 Mr. FULLER: And everything else that happened in the District of Columbia on or about the same date.

The COMMISSIONER: Go on and give your answer.

Mr. GANS: If the Commissioner will look at my question you will find I directed it to this proceeding, as to when that was made and who made it. That would be answered in two words; it would be answered by the words, I made it, it was made on the 1st day of June. Now that is all that is pertinent to my question.

The COMMISSIONER: Now he is telling you how it was made.

Mr. GANS: I didn't ask that.

Mr. FULLER: Just one word now. Here is a record of a court, or photographs of a record of a court. Now are you going to allow this man to go behind everything that is there in writing and explain why he made certain entries on the record?

The COMMISSIONER: No; of course not.

Mr. FULLER: I don't think that it is competent at all to tell all the conversations that the clerk has had with different attorneys in the District of Columbia showing his mental operations,
95 as to why he did this and why he did that. That is not competent.

The COMMISSIONER: He is merely saying how he came to make it.

Mr. FULLER: We don't impugn his motives in the slightest degree concerning the change here; it is not a question of intent.

Mr. GANS: Let us get our record straight.

The COMMISSIONER: I don't want to go into a lot of hearsay testimony.

Mr. DORR: Mr. Fuller says you cannot go back of the record. If that is true the whole question is incompetent. Now if we are going back of the record at all, which is perfectly clear on its face, then we are going to find exactly what happened. You cannot go half way, or as far as you think you want to go and then stop.

Mr. GANS: Will your Honor send for 36 Fed. Rep.?

The COMMISSIONER: I cannot get it just now.

Mr. GANS: There is a case in 36 Fed. Rep. and also the McKinney case, which supports this proposition I am going to speak to now. I am referring now to a case in the highest court of the State of Virginia, and I will read to you the circumstances as they
96 appear in the record of that case in the books. (Reading and arguing at length).

The COMMISSIONER: Your contention is this clerk had no right to correct his minutes and strike that out?

Mr. GANS: Yes; and he made it subsequent to the original entry.

Q. Mr. Hawken, you have testified that this amendment of the record that we are speaking of was made by you and was made on the first day of June, several days subsequent to the original entry of the record?

A. Two days.

Mr. DORR: The first court day after the day of entry?

The WITNESS: Yes.

Q. It was several calendar days later, that is so, is it not?

A. That is exactly right.

Q. There is but one question more I want to ask you with regard to that, and that is this: Before making that entry you had received no order of the court to make it?

A. I didn't consider it necessary.

Mr. GANS: I ask to strike it out.

A. I didn't receive the order of the court.

Q. In other words, you did it on your own initiative; yes or no, please?

A. Yes; I did so.

Q. Now, then, sir, I will show you the photograph num-
97 bered exhibit 2 of this date and call your attention to the fact that there appears therein "3 Frederick A. Peckham" and line drawn through it, and then underneath that the word "Edwin S. Holmes, Jr." Will you tell me who made that correction and on what date?

A. This is a page taken from docket No. 25 of the criminal docket of the Supreme Court of the District of Columbia; this correction was made at the same time that the other correction was made and under the same circumstances.

Q. That is, your own initiative?

A. Of my own motion.

Q. Mr. Hawken, you are familiar with the records of your court?

A. I am, sir.

Q. And you know these to be copies of the face and back respectively of a presentment filed in the Supreme Court of the District of Columbia, do you not?

A. Yes; I recognize those to be—I recognize exhibit 5 to be the face of the presentment filed in the Supreme Court of the District of Columbia on May 29, 1908; and I recognize exhibit 4 to be the back of the presentment, apparently the back of the same presentment that exhibit 5 is a photographic copy of the face of in that same case.

Q. I ask you the same question with respect to the photo-
98 graphic copies of exhibits 6 and 7 of this date?

A. Yes. This appears to be a photographic copy of a face and back of a presentment numbered 26089.

Q. Now, will you tell me, sir, if you know, whether the presentment No. 26089 was filed in the Supreme Court of the District of Columbia prior to a certain alleged indictment bearing the same number?

Mr. DORR: I object.

Q. And a purported copy of which is in evidence here?

Mr. DORR: I object on the grounds already stated and on the further ground that the Supreme Court has held that in these removal proceedings it is not competent for the Commissioner to go into jurisdictional facts attending the finding of the indictment in order to determine whether that indictment is or is not sufficient. You will recall in the Green case the very vital question was attempted to be raised as to whether or not a proper Grand Jury was in session, which had a right to go into the indictment, which had a right to find an indictment.

Mr. FULLER: That is an entirely different question. That point went to the constitution of the Grand Jury and attacked that
99 body that was alleged to have found an indictment as being illegally constituted. We are not doing that.

The COMMISSIONER: You are trying to get around it.

Mr. FULLER: Not a bit of it. We are not raising any question about the constitution of the Grand Jury, nor to look behind the door of the Grand Jury room at all, but we are trying to show to your Honor that these indictments, that there are no legal indictments on which this defendant can be removed.

Objection sustained. Exception taken.

Mr. GANS: Just let me point out to you what our theory is and then show why we think these particular questions—there are only two questions to be asked here and ought to be answered in the light of all proof we have offered to you—our contention is, right or wrong, and whether it is right or wrong everybody, you want, sir, that it should be passed on by the court, and Mr. Dorr ought to want that it should be passed on by the court, are those right or wrong, of sufficient form. Under the laws of the District of Columbia a paper does not become an indictment, no matter what is done to it unless prior to its filing a certain act has been done by the Grand

Jury, a certain official act has been done by the Grand Jury
100 and certain other things have been done in the records of the court our contention is, and under the law which prevails in the District of Columbia——

The COMMISSIONER: You asked whether a presentment was filed and he said no when you first examined him as I understood it.

Mr. GANS: I don't think that has been brought out, sir. That is all we are driving at.

The WITNESS: In order to make the record clear, I stated that the fact that a presentment, if a presentment was filed, the fact would not be entered in the minutes of the court, but would be entered on the docket.

Mr. GANS: I just want to show the order of filing of the presentment and indictment, if he knows anything about it. My contention is that one has to be filed prior to it and I want to know if he knows anything about the order.

Mr. DORR: I would like an opportunity to state my objection. As I understand my friends, their contention is that there cannot be a valid indictment unless it is preceded by a presentment. That point the Government believes for the reasons previously stated and authorities previously cited is not well taken. What the defense is endeavoring to do here is exactly what the defense endeavored to
101 do in the Green case, namely, go back of the indictment and hold that because some preliminary step required by the law was omitted the indictment was invalid. Now in the Green case there were certain formalities by law required on the finding of an indictment by the Grand Jury.

The COMMISSIONER: I am going to sustain the objection and give them an exception.

Mr. GANS: In order that we may get our record straight we will take your ruling without further argument.

Q. I will ask you whether you know the order in which the presentment No. 26088 and the alleged indictment containing the same number were presented together?

A. I haven't any distinct recollection about that one indictment and presentment. I can testify as to the general order and what must have been observed in this case.

The COMMISSIONER: You can give that.

A. Yes, I know. I will say I know with that qualification.

The COMMISSIONER: I think that is proper.

Q. And that would apply of course to the alleged presentment and indictment No. 26089?

A. Yes sir.

Q. Now then, I will ask you to tell us in what order the presentment and indictment No. 26088 were presented to the
102 court.

Mr. DORR: I object on the same grounds stated.

Objection sustained. Exception taken.

Q. And I ask you the same question with regard to No. 26089.

Same objection, ruling and exception.

Q. Now, Mr. Hawken, I ask you whether you know if there is any paper filed in your court at or about this time bearing an endorsement as appearing to be by the endorsement an indictment against Theodore H. Price, Moses Haas and Edwin S. Holmes, Jr. for conspiracy—appearing by its endorsement?

Mr. DORR: I object on the ground that the record is the best evidence and speaks for itself.

Mr. GANS: I cannot have all the books of the District of Columbia here to show by the record that there isn't any such on the minutes.

Mr. DORR: And on the further ground that it is immaterial.

Objection sustained. Exception taken.

Q. I ask you whether on the records of your court there appears any presentment against Theodore H. Price, Moses Haas and
103 Edwin S. Holmes, Jr. for the crime of conspiracy or otherwise; presentment, I say, and not indictment?

A. I will say none that I know of. There are none filed against Theodore H. Price, Moses Haas and Edwin S. Holmes, Jr. on May 29th, 1908. I will say that positively. I will say within five years of that date, because I don't know what the records before that date show.

Q. Now, then, I ask you Mr. Hawken whether within five years there is any other presentment against Theodore H. Price and Moses Haas other than that of which exhibit 6 is a photographic copy as appears by the records of your court?

A. No; there is not so far as I know.

Cross-examination by Mr. DORR:

Q. You are a deputy clerk of the Supreme Court of the District of Columbia?

A. I am a deputy clerk of the Supreme Court of the District of Columbia assigned to duty in Criminal Court No. 1.

Q. Is it part of your duty to keep the records of the criminal branch?

A. Yes, it is; that is my sole duty.

Q. When an indictment is handed down do you receive any express order of the court to make a record?

A. No sir.

Q. You have simply a standing order in the court that you shall do it?

104 A. It is my duty to note the names of those against whom indictments are returned on the minutes of the court and to put on the docket the names of those against whom indictments are returned.

Q. There isn't any order given in the case of an individual indictment?

A. There is no order of the court made in the premises whatsoever.

Q. That is part of your duty, to make these entries; that is the understanding; there isn't any individual order in a given case?

A. There is never any individual order for doing that.

Q. And you are testifying as to records, photographic copies of which have been offered in evidence as kept by you?

A. Exactly. That is correct.

Q. Is it your understanding, or have the instructions you have received been to make complete records of the names of persons indicated?

A. Yes; make a true record of the presentments and indictments.

Q. And if at any time you have in making a record omitted to make a complete record has your duty been complete?

Mr. GANS: I object to that. The witness is being asked as to his conclusions as to what he had to do.

Mr. DOBE: Based on his instructions given to him.

105 Mr. GANS: If there are any instructions that it is based on I will ask that that question be so framed that that be presented, and then I will make my objection to that, but he ought not to be permitted to give his conclusion as to what he had to do.

Question withdrawn.

Q. In making the record of persons indicted under #26088 you made the first entries on that record May 29, 1908?

A. On May 29th I copied the caption which was endorsed on the back of the indictment numbered as you have stated, 26088.

Q. You made that without inspecting the indictment, but merely from the endorsement on the indictment?

A. I followed my custom, which is to copy the names in the caption, because that is the only place where there is a caption and the names might appear.

Q. You looked on the endorsement to see the names?

A. Yes.

Q. Did you subsequently examine the indictment itself?

Objected to.

Objection overruled. Exception taken.

A. I did.

Q. And did you find that the records as made—when did

106 you do that?

A. According to my best recollection I made that examination on the 1st of June, 1908.

Q. That was the first court day after May 29th, the date on which the indictments were handed down?

A. Yes.

Q. After inspecting that indictment did you or did you not discover that the record you had made on May 29th was an incomplete record of the names of the persons indicted under 26088?

Mr. GANS: I object to that on the ground that it calls for a conclusion of this lay witness with respect to this whole question of law which is presented here.

The COMMISSIONER: I will allow it and give you an exception.

Mr. GANS: Before you rule, just remember if he is not going to tell us what somebody told him to do, then he is going to tell us what he found on the face of the papers.

The COMMISSIONER: His attention happened to be called to it in some way, but I don't want to know how or by whom. He saw an error had been made and he corrected it.

Mr. GANS: What can he tell us except that he looked at the face of the papers, of the indictment and put in some names rather
107 than those that the Grand Jury said ought to be put in.

Mr. DORR: The Grand Jury doesn't say the caption should be put in the record; the Grand Jury says certain persons who are named in the indictment.

Mr. GANS: We except on the ground that it is irrelevant and immaterial, that it calls for the conclusion of the witness, and also calls for the contents of a paper which he is said to have examined.

A. When I examined the body of the indictment, I saw that the names contained therein varied with the names contained on the back thereof; that while the name of Holmes appeared in the body of the indictment that the names of Holmes did not appear on the back of the indictment, and that while the name of Peckham appeared on the back of the indictment the name of Peckham did not appear in the body of the indictment, whereupon I took my red ink pen and drew a line through the name of Frederick A. Peckham seeing that the record showed that an indictment has been returned against him on that date, whereas it had not been, and inserted the name of Edwin S. Holmes, Jr., against whom the indictment had been returned in order——

108 Mr. GANS: I object to that and I ask to have it stricken out.

The COMMISSIONER: You are now going into the conclusion of the Grand Jury. Just tell us about altering that again.

Mr. GANS: Will your Honor strike out the words: "Edwin S. Holmes, Jr., against whom the indictment had been returned?

The COMMISSIONER: Yes.

A. Whose name appeared in the body of the indictment.

Q. And in doing that were you completing your record?

Mr. GANS: I object to that.

The COMMISSIONER: I suppose he made the record in accordance with the facts.

Mr. GANS: Why should he testify to that conclusion. He has told us what he had done?

The COMMISSIONER: He said in looking over the face of the indictment he found Holmes' name appeared on it and he put it in and made it in accordance with that paper.

A. And I did it in order to make it conform to the face of the indictment.

The COMMISSIONER: I will allow it and you can take an exception.

109 A. I did it in order to make the record conform to the face of the indictment.

Q. You are familiar with the records of the court, and are you familiar with the practice as to the making of presentments?

A. Yes; I know how indictments are returned to the court; I have had thousands of them returned to me and copied on the record.

Q. Do you know whether it is the invariable practice in the District of Columbia to accompany an indictment with a presentment.

Objected to. Objection sustained.

Q. This photograph now represents the record. Exhibit 2 represents the record of indictment No. 26088 as it now appears in the Supreme Court of the District of Columbia?

A. Yes, and it has appeared since the date I mentioned.

Q. And Exhibit 3 of this date represents a copy of the minutes?

A. Represents a photographic copy; that is a photographic copy of page 330 of the criminal minutes No. 11 of the Supreme Court of the District of Columbia.

Q. As it now stands?

A. As it now stands.

Q. On June 1st you had some conversation with Mr. Lester, you say?

A. Yes.

110 Mr. GANS: Objected to.

Q. (Continuing:) Who represented the defendant Holmes, as to the records?

A. Yes, I did.

Mr. GANS: I object to the answer to the question.

Objection sustained.

Q. As soon as you found that you had made a mistake, or that you had made a mistake as to the defendant Peckham, was it then that you drew the ink line through the name of Frederick A. Peckham as appears on exhibits 2 and 3 of this date?

Mr. GANS: I object to that.

The COMMISSIONER: Objection sustained for the reason that the witness already testified that his attention having been called to this indictment on June 1st he saw that the record did not correspond with the body of the indictment, and that the endorsement did not correspond with the face of the indictment, and therefore he made these alterations as to additions and erasures.

The WITNESS: I didn't make an erasure. I struck it out with a line.

Q. The addition and the striking out of the name of Frederick A. Peckham?

111 Mr. FULLER: If your Honor please, in addition to the photographs which we have of these records, we offer in evidence certified copies of the presentment which correspond with exhibits 5, 4, 1, 3 and 2.

Mr. DOBB: I object on the grounds as objected to before, and on the additional ground that if they do not prove anything in addition they are clearly incompetent.

Mr. FULLER: It is merely a certified copy of the record just to make the proof complete.

Objection overruled.

Mr. DORR: And I further object to the presentments on the same grounds as made before that the inaccuracy or absence of the presentment is immaterial for the reasons assigned in the Supreme Court in the Green case.

Marked Exhibit 8 of this date.

Mr. FULLER: We also offer certified copies of the records showing certified copies of the papers photographed in exhibits 6 and 7.

Same objection, and ruling.

Marked Exhibit 9 of this date.

Mr. FULLER: We offer the indictment found in the Southern District of New York against Theodore H. Price and Moses Haas
112 on the 29th of May, 1908, being No. 308, and the indictment against Theodore H. Price, Moses Haas and Edwin S. Holmes, Jr., found in the Southern District of New York on the 29th of May, 1908, being No. 309.

Mr. GANS: Maybe Mr. Dorr will concede this, subject to the materiality, that on the New York indictments admitted in evidence Mr Price has been arraigned and is now under bail?

Mr. DORR: Yes, I concede that, and make the same objection also as to its materiality.

113 WILLIAM L. LANNING, sworn on behalf of the defense, testified as follows:

Direct examination by Mr. GANS:

Q. Mr. Lanning, where do you reside?

A. In the District of Columbia.

Q. What is your full name?

A. William L. Lanning.

Q. Are you the same William L. Lanning whose name appears endorsed upon the back of the alleged indictment No. 26088 purporting to have been found in the courts of the District of Columbia?

Mr. DORR: I object to that as entirely immaterial, irrelevant and incompetent.

Objection sustained. Exception.

Q. And also on the back of the alleged indictment No. 26089 which I show you here?

Same objection, ruling and exception.

Q. Did you, Mr. Lanning, about the end of May, 1908, receive a subpœna to attend before the Grand Jury in session in the District of Columbia?

Same objection, ruling and exception.

Q. And did you as a matter of fact appear before the Grand Jury in the District of Columbia at that time?

114 Same objection, ruling and exception.

Q. Did you give any evidence before the Grand Jury in the District of Columbia at that time in a case in which Theodore H. Price was defendant?

Same objection, ruling and exception.

Mr. GANS: Mr. Commissioner, the questions that I have just asked are preliminary to a series of questions which I purpose to ask this witness and of the other gentlemen whose names appear endorsed on the back of the indictment for the purpose of rebutting the *prima facie* case made by the alleged indictments themselves in this manner, that is, that I desire to prove by this witness, or these witnesses who are certified here as the Government's witnesses that they and none of them have any information which would tend in any way to connect Mr. Price with any conspiracy alleged to have been formed in the District of Columbia, or alleged to have been entered into in any other place, and that their testimony, therefore, if given in open court, would have no tendency whatever to establish probable cause that Mr. Price was guilty of the crime attempted to be set forth in the indictments, or of any crime.

115 Mr. DORR: If that is the purpose for which this evidence is offered I object to the question on the ground that the Supreme Court has held in the case of United States *vs.* Beavers that the sufficiency of an indictment as evidence of probable cause cannot be rebutted by either an attack on the indictment itself or by an effort to show that it was founded on insufficient evidence, which I take to be the object of the defense. The Government objects on the further ground that such a proceeding would inevitably operate as a means by which the defendant could ascertain the evidence in the possession of the Government, and that under the ruling of the Supreme Court in the case of the United States *vs.* Beavers the proceeding before the Commissioner cannot be used for that purpose.

Mr. GANS: The Commissioner will understand we do not propose to ask any of these witnesses what they testified to before the Grand Jury, but that we are intending to search their consciences for the purpose of ascertaining what they can now testify to before a petty jury and to establish then that they could not testify before a petty jury to any facts which would tend to connect Mr. Price with any guilty act.

116 Q. Mr. Lanning, do you know Mr. Theodore H. Price, the gentleman here present?

Same objection ruling and exception.

Mr. DORR: If this question is asked merely for the purpose stated by the defendant, the Government objects on the grounds heretofore stated. The Government recognizes that the defendant has a right to produce evidence which tends to show affirmatively his innocence.

Mr. GANS: The purpose is by showing that all the witnesses which have been before the Grand Jury, that they single and in the aggregate have no information which would tend to connect Mr. Price with the commission of any criminal act, to affirmatively rebut any presumption which is created by the indictment itself; by that I do not mean that we intend to ask the witnesses for any affirmative fact, but that my contention is that by proving their lack of knowledge we may be permitted to rebut the inferences that are to be drawn from the indictment.

The COMMISSIONER: The Commissioner states in view of the decision in the case of Beavers *vs.* Henkel that he does not think the defense has a right to go into this line of evidence.

Exception taken.

117 Q. Have you ever had any conversations with him?

Same objection, ruling and exception.

Q. Have you ever seen any writing of his?

Same objection, ruling and exception.

Q. Or any paper purporting to be a writing of his?

Same objection, ruling and exception.

Q. You have never had any conversations with him?

Same objection, ruling and exception.

Q. Have you ever seen him in the District of Columbia?

Same objection, ruling and exception.

No cross-examination.

118 Mr. FULLER: We offer the following witnesses for the same purpose as Mr. Lanning: Andrew Parker, Samuel S. Baulsir, Nathaniel Murray, Lewis C. Van Riper, Herbert H. Smith, Richard A. Springs, Victor Armsted, Russell Coates and Walter Meyer.

Mr. DORR: The same objection if it is offered for the same purpose.

Same ruling and exception.

CHARLES L. MATTHEWS, sworn on behalf of the defense, testified as follows:

Direct examination by Mr. FULLER:

Q. You live in New York?

A. Yes sir.

Q. What was your occupation or employment in the Spring of 1905?

A. Room clerk at the Waldorf Astoria Hotel.

Q. Do you know Mr. Theodore H. Price?

A. Yes sir.

Q. Was Mr. Theodore H. Price at the Waldorf Astoria Hotel on May 31, 1905?

A. Yes sir, he was.

Q. Was he there all day?

A. I couldn't fix the exact hour that he arrived, but the record shows he registered on that day and probably by referring to the register I could fix it better by the way the register should appear.

119 Mr. DORR: Did you make these entries yourself?

The WITNESS: Yes.

Q. About what time of the day did Mr. Price register at the Waldorf Astoria on the 31st of May?

A. From the position on the register as near as I could determine

it would be rather late in the afternoon, because of its position. I will explain we use four of these books and it might not be in this rotation, although on this book he appears very late; that is, late during the afternoon.

(By Mr. DORR:)

Q. Do you know Mr. Moses Haas?

A. Not to my knowledge.

Q. Will you examine your register to see if Mr. Haas registered at the Waldorf on May 31st, 1908?

A. That is not a complete register. (After examination) I don't find his registration.

Q. Just what were your duties at the Waldorf at that time?

A. Rook clerk.

(By Mr. FULLER:)

Q. Do you know how long Mr. Price stayed at the Waldorf on this occasion?

A. His ledger account shows that he left on the morning of June 2nd, having stayed two nights.

(By Mr. DORR:)

Q. Do you know that of your own knowledge?

120 A. Yes sir.

Q. Did you keep that ledger account?

A. No sir.

Mr. DORR:

Q. Then I move that that be stricken out, the ledger account, it is not the book produced here.

Motion granted. Exception.

Q. Have you any present recollection of having seen Mr. Price in the Waldorf Astoria on the 31st of May, 1905?

A. I have nothing to fix it so far back. I have roomed Mr. Price several times, but there is really nothing to fix it but the record; that is my registration.

Q. And you have no recollection as to the exact hour he came other than from the general indication presented by his position on the register?

A. Yes.

Q. And you have no recollection of about how long he stayed?

A. Only the record of the ledger account that he paid for two days.

Q. You were not interested in that transaction personally?

A. I verified that we accepted the two days pay.

(By Mr. FULLER:)

Q. You know the handwriting of Mr. Price?

A. I do, yes.

Q. Will you look at the name Theodore H. Price on that and see if that is in the handwriting of Theodore H. Price?

A. Yes, to the best of my knowledge. I am familiar with
121 the characteristics of his handwriting and that is Mr. Price's handwriting.

Q. What position on the page does that name hold?

A. Practically the center; about two lines above the center I should say.

Q. And there are several names preceding it and several names after it?

A. Yes.

Q. Is the room number the letters which assigned him to a certain room in your handwriting?

A. Yes; those are my initials.

Q. On looking at this page, will you please state whether the name Theodore H. Price——

(Withdrawn.)

(By Mr. GANS:)

Q. Now after looking at that register and the name Theodore H. Price there and your room number opposite, you can say with perfect positiveness that Theodore H. Price registered at the Waldorf in your presence?

A. Yes sir.

122 CHARLES P. WARD, sworn on behalf of the defense, testified as follows:

Direct examination by Mr. FULLER:

Q. Where do you reside?

A. In Rye, Westchester County.

Q. What was your employment during the spring and summer of 1905?

A. I was superintendent and coachman for Mr. Theodore H. Price.

Q. Where was Mr. Price and his family living during May 1905?

A. In Princeton, N. J.

Q. Do you recall having seen Mr. Price on the 30th of May, 1905?

A. Yes sir.

Q. At what hours of that day do you recall having seen him and where?

A. I first saw Mr. Price at his house that morning at 9 o'clock; it was Decoration Day.

Q. That was at Princeton?

A. At Princeton, N. J.

Q. Well, then did you see him later in the day?

A. Yes sir.

Q. Where?

A. At the stable.

Q. About what time of the day was that?

A. About quarter of three.

Q. And where?

A. At the ball field.

Q. What was the occasion of your seeing him at the ball field? At the baseball ground you mean?

A. At the baseball ground at Princeton.

123 Q. What was the occasion of your seeing him there?

A. Taking one horse there in a knock-a-bout wagon to take Mr. Price to his house.

Q. Do you recall having seen Mr. Price later?

A. Yes.

Q. At what time and where?

A. About 10 minutes past seven in the evening again passing the stable with a pair of horses that he had had given to him, sent up by another man to his house to Mrs. Price and went to drive.

Q. Did you see him later than that?

A. I did not.

Q. Did you see him next morning on the 31st of May?

A. I did.

Q. What time did you see him?

A. About I would say 10 minutes to eight.

Q. What was the occasion of your seeing him at that time?

A. Taking Mr. Price to the station.

Q. Why is that morning fixed in your mind; is there any particular fact that recalls it?

A. Yes sir. I have always prided myself on never having any lame horses and that morning unfortunately I had one, and remarked that it was very strange that Mr. Price had not noticed the horse being lame.

Q. You have known Mr. Price for quite a long while, have you not?

A. I have known Mr. Price since two days before Thanksgiving Day, 1904.

124 Q. Mr. Price lived only in Princeton or New York during the spring of 1905?

A. The spring of 1905 he was in Princeton and New York.

Q. And after he left Princeton do you know where he lived?

A. Yes sir.

Q. Where?

A. At Sterlington, N. Y.

Cross-examination by Mr. Dorr.

Q. You say that on the evening of the 30th Mr. Price went out for a drive at 7:10?

A. No. He didn't. I said I saw Mr. Price passing the stable door on his way home with a pair of horses.

Q. Driving?

A. Yes.

Q. You are quite sure of that?

A. I am positive of it.

Q. 7:10?

A. 7:10.

Q. On May 30th?

A. May 30th.

Q. 1905?
A. Yes.
Q. The horse was lame that day?
A. No; the next day. That was a different horse altogether; he had different horses.
Q. What day of the week was that?
A. It was on a Tuesday night I think.
Q. Whose employ are you in now?
A. No one's. I am retired.
Q. Not working?
A. No.

125 RUSSELL COATES, sworn on behalf of the defense, testified as follows:

Direct examination by Mr. FULLER:

Q. Mr. Coates are you associated with Mr. Price in business?
A. I am.
Q. You live in New York City?
A. No; I live in New Rochelle.
Q. You are in business in New York City?
A. I am.
Q. Mr. Coates, can you say whether or not Mr. Price was at his place of business on the 31st day of May, 1905 during business hours?
A. He was.
Mr. FULLER: I mean during business hours generally. I don't mean he did not leave the office for a minute or so, of course.
Q. Let me ask you another question. Was he there at various times during the day?
A. He was.
Q. Both morning and afternoon?
A. I don't remember the time he left, but the greater part of the day.

No cross-examination.

126 It is agreed that briefs shall be submitted in the interim between this and the adjourned date.
Hearing adjourned to Saturday, December 19th, 1908, at 10:30 A. M.

127 UNITED STATES
vs.
T. H. PRICE ET AL.

NEW YORK, *January 6th*, 1909.

Appearances: G. H. Dorr, Esq., for the United States. Mr. Gans and Mr. Fuller for the Defendant Price.

C. CLINTON JAMES, being first sworn, testified as follows:

Examined by Mr. GANS:

Q. Where do you reside?
A. Washington, D. C.

Q. And you are a lawyer?

A. Yes.

Q. Duly admitted to practice in the courts of the District of Columbia?

A. Yes.

Q. And for how long have you been practicing there?

A. I was admitted December 13, 1898.

Q. You are familiar wit' the practice of the courts of the District of Columbia with respect to the entering of orders that may be made by the court and in what places those orders are entered?

Mr. DORR: I object on the ground that this witness is not a proper witness to testify to that fact, and it is immaterial, in-
128 competent and irrelevant.

The COMMISSIONER: He is not an officer of the court. He is in one sense, but not so far as the entering of orders is concerned.

Mr. GANS: He can be familiar with the practice certainly. I know as an attorney here what the practice of the court is with respect to entering orders and where they are entered. If your Honor please, this is a question of law and practice.

The COMMISSIONER: You want to know about the practice of entering orders?

Mr. GANS: Where they are entered.

The COMMISSIONER: Do you say you know it?

The WITNESS: I know the books of entry in the clerk's office where orders and decrees are entered.

Mr. DORR: I still object to his competency. He is not the custodian of the records and hasn't charge of the making of the records and is nothing but an attorney.

The COMMISSIONER: I think you are right about it.

Mr. GANS: Let me make this little presentation: I think that it will be agreed by everybody that the way to prove a question
129 of law or a question of practice in another jurisdiction is to call somebody who is qualified to speak with respect to the question of law and the question of practice. That qualification which enables a person to speak with regard to that is that which applies to every other expert, and that is that he shall be a person who has educated himself to that particular profession. If I want to prove what is generally proper in the way of performing certain operations in a medical case I call a doctor and establish that he is a doctor and has had some experience as a doctor and then I am prepared to ask him what is the general practice in the way of performing those operations.

The COMMISSIONER: I will allow you to put the question whether he inspected the records and what he found entered.

Q. Mr. James, have you inspected the records of the Supreme Court of the District of Columbia?

Mr. DORR: Objected to on the ground that this is precisely the same thing which I think your Honor yourself, if not some other commissioner in this district, refused to allow in evidence in the Green *vs.* Henkel case. It is an endeavor to go back of the indict-

ment, to the preliminary steps which they say tends to show invalidity. They tend to go back of the record of the Grand
130 Jury; they argued that there was no Grand Jury and therefore there could be no indictment. They are trying here to show that because of some preliminary omission that when the Grand Jury purported to hand this indictment into court they were handing in a nullity. Here is a case where your Honor should take the same stand taken in that case, and which stand was sustained by the Supreme Court saying that you cannot go back of an indictment; that when a paper is produced which bears the certification of another district that it is an indictment which is outstanding therein, that you cannot go back of it; that it is *prima facie* proof that there is a valid indictment there. The provision in the Constitution by which defendants are entitled to be tried in the district where the offence is committed carries with it certain burdens as well as certain privileges. A certain district is made the place of trial, the place where the indictment must be found, and the court of that district has jurisdiction over that indictment and all proceedings that lead up to it. The defendant cannot be tried at any other district but that, and that being the case it is in that district, the district where the offence is alleged to have been committed, that questions
131 of technical sufficiency of the pleadings must be determined, and all questions as to the technical steps to precede such findings of those pleadings. That is, that the constitutional provision carries with it necessarily, as necessarily incident to that privilege, a burden and it is that burden which my friends are trying to evade here; trying to evade going into the court where this offence is properly triable, where the indictments are outstanding and where the court has the jurisdiction to determine whether or not that indictment is valid. And I think your Honor should take a definite stand in this case and say what you did in the Green case, that you will not permit the Commissioner's court here to be used in the intent to shift jurisdiction over these matters from the District of Columbia—the Supreme Court of the District of Columbia—to the Magistrate's Court in the Southern District of New York.

I also move to strike out all the records and all the evidence that has heretofore been produced as to the lack of presentment on the same grounds—that the whole thing is immaterial. It is not something which your Honor can properly entertain in this matter, and that is exactly analogous to the situation in Green *vs.* Henkel,
132 in which the Supreme Court sustained your Honor, or the Commissioner of the Southern District of New York.

Mr. GANS: Let us see what this is going to amount to, as a practical proposition. The matter we have submitted is, whether it is in or out, in a certain sense would make very little difference at the ultimate determination of this case except as far as having questions shown affirmatively rather than negatively. If we offer evidence we have a right to offer and your Honor rejects it our writ of *habeas corpus* is founded and sustained upon the rejection of the evidence as well as it would be upon its admission, the only difference being that if the evidence is admitted and we show positively the facts upon

which we claim, why there is a positive record before the court; in the other event the court is bound to admit everything against the ruling of the Commissioner. I say frankly that it makes comparatively little difference as to the ultimate outcome, but I want you to be correctly guided and it seems to me that the admission of the evidence is the course which is the proper and the safer course.

The COMMISSIONER: I will sustain the objection and give you an exception.

Mr. GANS: You are not granting the motion to strike out the former record?

133 The COMMISSIONER: No; as to this witness' testimony only.

Q. Mr. James, I will ask you this question which, of course, you will not answer under the ruling of the Commissioner: First I will ask you whether you are familiar with the practice in the courts of the District of Columbia relating to the filing of orders by the court?

Mr. DORR: I object to it as immaterial, incompetent and irrelevant. The man is not properly qualified.

Q. Does that practice obtain with respect to all classes of orders, both Judge's orders and court orders?

Mr. DORR: Same objection.

The COMMISSIONER: You practice in that court?

The WITNESS: Yes sir.

Mr. GANS: He is permitted to answer those questions I understand?

The COMMISSIONER: Yes.

Q. You say you are familiar?

A. I am familiar with the records and the way in which the clerk enters orders and decrees.

Q. It is the practice in the District of Columbia to file such orders as are made by the Supreme Court or by the judges thereof in

134 the office of the clerk of that court?

A. Every paper filed in a case is entered on the docket.

Q. If I am right in my statement, can you say yes to that?

A. Yes.

Q. Now then, it is also the practice in the District of Columbia, is it not, that when an offender is bound over for the action of the Supreme Court by a magistrate or otherwise, that a record of such fact appears in the office of the clerk of the Supreme Court?

Mr. DORR: Objected to as leading in form and as immaterial, irrelevant and incompetent.

Q. What is the practice then with regard*ing* to filing a record in the office of the Supreme Court in instances where offenders have been bound over by a magistrate or otherwise for the action of the court?

Mr. DORR: Objected to on the ground that sufficient foundation has not been laid and the witness has not been qualified as to his knowledge.

Q. Do you know anything about that practice?

A. I am very familiar with the records in the clerk's office, having examined them a number of times.

Mr. DORR: I ask that the answer be stricken out as not re-
135 sponsive.

The COMMISSIONER: Let him get down his answer and we can strike out such portions as are not responsive.

A. I am familiar with the records in the clerk's office of the Supreme Court of the District of Columbia, and I am constantly using them as a practicing attorney and title examiner, having examined a good many titles since I have been admitted to the Bar.

Mr. DORR: I ask that that answer be stricken out as not responsive. It does not show any knowledge of this witness' knowledge as to the holding before the Grand Jury and is entirely irresponsive.

Motion granted. Exception.

Q. In the examination of the records which you say that you have made in the office of the clerk from time to time in the course of your practice, have you discovered on those records entries of the fact that an offender has been bound over for the action of the Grand Jury?

Mr. DORR: Objected to on the ground that it has no relation to this particular defendant and is incompetent, immaterial and irrelevant.

The COMMISSIONER: I don't see the competency of it.

Exception taken.

136 Q. And have you discovered that to be the uniform practice in such cases?

Mr. DORR: Objected to; no practice having been testified to.

Objection sustained. Exception.

Q. By the last question I mean to refer to matters to which I directed your attention in the last question but one which has been ruled out by the commissioner; you understand that?

Same objection, ruling and exception.

Q. Now then, did you have a conversation with the clerk of the Court of the District of Columbia within the past two or three weeks in which you made a request of him to search his records?

Same objection, ruling and exception.

Q. In that conversation did you ask him to make a search of the records relating to proceedings in indictment No. 26088 and indictment No. 26089 pending in that court?

Same objection, ruling and exception.

Q. In response to that question what did the clerk say to you?

Mr. DORR: Objected to on the ground that it is based on testi-
mony which is not in the case, and leading in form, and im-
137 material, incompetent and irrelevant.

Objection sustained. Exception.

Q. In response to your request of the clerk that he make a search of the records with respect to indictments Nos. 26088 and 26089 pending in his court, did he decline to make any such search?

Mr. DORR: Objected to as leading in form and immaterial, incompetent and irrelevant, and based on assumptions as to which there is no testimony.

Objection sustained. Exception.

Q. In the conversation to which I have directed your attention in the questions which have been ruled out did you ask him to search the records for the purpose of discovering whether they disclosed these two facts or either of them: First, whether there was any order of the court or a judge thereof directing that the bills of indictment which appeared on the files of the clerk's office should be submitted to the Grand Jury; and second, whether there appeared on the records of the court any entry showing whether any one of the persons named in those indictments had been bound over to the court?

Mr. DORR: Objected to on the ground that it is leading in form and assumes facts as to which there is no evidence, and is immaterial, incompetent and irrelevant in that it is directed to-
138 ward the collateral attack on the validity of indictments which have been certified to this court by the Supreme Court of the District of Columbia as outstanding in that district.

Objection sustained. Exception.

Q. Did you thereafter make a search of the records of the court for the purpose of ascertaining whether or not there appeared upon the records any entry of an order by a judge of the court, or by the court, directing that bills of indictment against the persons named as defendants in indictments Nos. 26088 and 26089, or either of them, be presented to the Grand Jury?

Mr. DORR: Objected to as leading in form and on the grounds formerly stated.

Objection sustained. Exception.

Mr. GANS: It is understood the commissioner does not sustain these objections on the ground that the questions are leading, realizing that in view of the exclusion of the proof leading questions must be asked.

The COMMISSIONER: Yes.

Q. Did you also search the records for the purpose of also ascertaining whether there appeared therein any entry showing
139 whether or not any one of the persons named in the bills of indictment Nos. 26088 and 26089, or either of them, had prior to the alleged finding of such bills as indictments by the Grand Jury been bound over to the court?

Same objection, ruling and exception.

Q. What was the result of any investigation which you made of the records of the court with respect to these matters?

Same objection, ruling and exception.

Q. How far back in the records of the court did you search for that purpose; by that I mean, through how many years of the records of the courts?

Same objection, ruling and exception.

Q. What method did you pursue in making such search?

Same objection, ruling and exception.

Q. What books did you examine in making such search?

Same objection, ruling and exception.

Q. Where was such search made?

Same objection, ruling and exception.

Q. What steps did you take to satisfy yourself that you had examined all of the records of the court pertaining to the subject?

140 Same objection, ruling and exception.

Mr. Gans: In order to perfect the record I am going to make the formal offer of proof. I offer to prove by the witness now on the stand that he is an attorney and counselor at law admitted to practice in the courts of the District of Columbia, familiar with the practices of those courts, and familiar with the practice with respect to the entry of orders in those courts and the places where such orders are entered and the other entries that are made on the records of those courts in instances where a judge or court has directed that a bill of indictment should be presented to the Grand Jury, and in instances where persons prior to the finding of an indictment by a Grand Jury have been bound over for the action of the court; that the practice in the District of Columbia under either of those circumstances is to make an entry in the court records showing that an order has been made directing the submission of a bill to the Grand Jury, or an entry showing that a defendant has been bound over for the action of the Grand Jury. That he has requested the clerk of the Supreme Court of the District of Columbia, who is the lawful custodian of the records of the court in which the alleged indictments herein have been
141 returned, that he make a search of those records and certify whether or not there appears on those records or among the papers on file in his office any order of the court or Judge directing that a bill of indictment against any of the persons named as defendants in the alleged indictments presented in this proceeding be presented to the Grand Jury; and also to search his records for the purpose of certifying whether or not any of such persons had prior to the finding of any bill of indictment against them been bound over for the action of the court or Grand Jury; that the clerk refused to comply with such request; that thereupon the witness made a search through all the records of the court in which such entries should appear or whereby such orders should have been discovered if they had been in existence, that such search was made for a period of over six years prior to the present date, and that as the result of such search he discovered that there appears upon the records of the court no order of any court or judge directing that any bill of

indictment against any of the persons named in the alleged indictments herein be presented to the Grand Jury, and no record that any of the said persons had been bound over for the action of the court.

142 Mr. DORR: I object to that on the grounds already stated. Objection sustained. Exception.

Hearing adjourned to Thursday, January 7, 1909, at 2 o'clock P. M.

143 UNITED STATES

vs.

THEODORE H. PRICE ET AL.

NEW YORK, *January 7th*, 1909.

Hearing resumed pursuant to adjournment.

Appearances: The Commissioner and Counsel as before.

RICHARD CHEATHAM, being first sworn, testified as follows:

Direct examination by Mr. GANS:

Q. Where do you reside?

A. Atlanta, Ga.

Q. What is your present occupation?

A. I am business manager of the Cotton Journal.

Q. In the year 1905 what was your vocation?

A. I was secretary of the Southern Cotton Association.

Q. Mr. Cheatham are you acquainted with James Wilson, the Hon. James Wilson, Secretary of Agriculture of the United States?

A. I am.

Q. Did you meet Mr. Wilson when he was Secretary of Agriculture in the year 1905?

A. I did.

Q. About what time in the year 1905 did you first see him?

A. I first met Mr. Wilson on June 6th, I think, 1905.

144 Q. Did you have a conversation with him at that time with reference to a cotton crop report that had been issued by the Department of Agriculture on June 1st or 2nd of that year?

A. I did.

Mr. DORR: Objected to as incompetent and immaterial, whether Cheatham had any conversation with Wilson. Mr. Wilson is not charged in the indictment with having divulged information and as one of the conspirators.

Mr. GANS: What we propose to prove by this witness, and it is evidently directly in rebuttal of the allegations of the indictment—the indictment charges as you remember that it was a custom and practice and regulation of the Department of Agriculture that no information of any character whatsoever should be given out with respect to the actions and transactions of the Department relating to cotton crop reports. What we purpose to show is that that allegation is not true, and the way we purpose to prove here, or the evidence

that we purpose to adduce in support of it by this witness is to show that the Secretary of Agriculture himself was giving out information with respect to the general character of reports about to be issued.

Now, if the indictment is to be taken as *prima facie* evidence
145 that such a custom as this existed, we certainly are entitled to prove that if there was any basis for a charge that the custom existed it was a custom that had become obsolete and was honored in the breach rather than in the observance, and the best proof that that was honored in the breach and not in the observance was that proof that the Secretary of Agriculture himself was disregarding it.

Mr. DORR: I have to say to that in the first place that the situation of the Secretary of Agriculture is different from that of the employé of any department; in the second place the violation of the custom and practice and of the laws we contend by the Secretary of Agriculture is not proof that the practice did not exist, or that the law itself did not exist.

Mr. GANS: Mr. Fuller calls my attention to another basis, and possibly a better one than I have stated, for the admission of this testimony: They not only allege that there is a rule of the department, but they allege that it is the custom and practice. There isn't any evidence before the court that there is a rule. Now whether or not it was the custom and practice of course is to be determined by the acts of the department. We admit that the indictment
146 is some proof that there was such custom and practice; now we are entitled to rebut that.

The COMMISSIONER: I think you are, too—by proper proof.

Mr. DORR: I think that the proper proof would be by calling the head of the Department of Agriculture, or some officer of the department. Because the Secretary of Agriculture in one or two instances departed from the rules laid down for the subordinates has no tendency to prove that these gentlemen did not conspire.

The COMMISSIONER: Taken subject to a motion to strike out on either side.

Mr. DORR: I make the further objection that it is alleged that this conspiracy was formed on the 31st of May, and this testimony is taken as to what occurred after the formation of the conspiracy.

Mr. GANS: That makes no difference. You can prove the custom by showing what happened after a certain date and approximate it as well as by showing——

The COMMISSIONER: I will allow it with leave to strike out if not found material.

Q. Did the conversation or conversations which you had
147 with the Secretary about that time also relate to the prospective issuance of another report by the department?

Same objection and ruling.

Mr. DORR: On the further ground that the question is so indefinite as to have no direct bearing on any of the issues about which this testimony is supposed to be advanced.

The COMMISSIONER: I will allow it with leave to strike out.

(By the COMMISSIONER:)

Q. How many conversations did you have with this man?

A. Well, if it is permissible for me to explain my position and why I was conversing with him——

Mr. GANNS: I will come to that directly.

(By Mr. GANNS:)

Q. You can answer that question I think, whether you also spoke to him not only in regard to the report that had issued, but the report that was to be issued?

A. Yes, I did.

Q. How many conversations did you have with the Secretary at or about this time?

Mr. DORR: I would like to ask preliminarily whether these conversations were had by you with the secretary in your capacity as press representative and whether they were confidential communications?

148 Mr. GANNS: I object to that. In the first place he was not a press representative at that time; he was just an officer of the Southern Cotton Association; and in the second place there is nothing confidential about what I say to a press reporter.

The COMMISSIONER: Go ahead.

Q. How many conversations did you have with the Secretary at or about that time?

A. Well, a number of them. I couldn't say how many, but I was in constant touch with him for two or three months, during which time I had a number of conversations regarding reports.

Q. Now, will you tell us the substance of your conversations with the secretary relating to the report that had been issued about June 2nd and relating to the report that was about to be issued?

Mr. DORR: To that question I object as improper in form; it relates to conversations as to a report which had already been issued. Now, conversations as to that report certainly have no tendency to show that the custom is to give out information in advance.

Mr. GANNS: The point about this is only this: The conversation with regard to the reports about to be issued is inextricably

149 bound up in the other.

The COMMISSIONER: This is about giving out information of something that is to take place?

Mr. GANNS: Precisely, and you are not going to be able to understand the bearing of the conversation that was about to take place unless you get the whole conversation taken at the time.

Mr. DORR: I ask that the witness be directed to answer merely—although my objection stands to answering even that—be directed to answering merely what information was given to him in advance of the official publication of the report.

The COMMISSIONER: I think that is proper; you can answer that way.

Q. Prior to the portion of the conversation or the conversation in

which the Secretary spoke to you about a report to be issued you had had a conversation with him in regard to a report that had been issued in which you made certain criticisms of that report, had you not?

A. I had.

Q. And in which you claimed that that report was erroneous in some particulars?

Mr. DORR: I object to that as incompetent and immaterial.

150

The COMMISSIONER: Don't use the word "claimed."

Q. Tell us what you said to the Secretary in substance with regard to what you believed to be the character of the report that had been issued?

Mr. DORR: I object to that on the ground that here again we are getting away from the one issue as to which this testimony has been ruled by your Honor to be competent, that is the form that the advance information as to the contents of the forthcoming report were given in advance of publication to this witness. Now why can't that question be put and the witness answer it.

Mr. GANS: I am putting it so that you will understand the conversation.

Mr. DORR: If we cannot understand the conversation it will be time enough to explain it.

Q. Will you tell us the substance of so much of the conversation that you had with the Secretary as related to the forthcoming report and what he said about the report about to be issued?

Mr. DORR: I object to that again in form, as it calls for much more than what your Honor has stated the witness could testify to; it calls for the whole conversation as to the forthcoming report. Now all that under your Honor's ruling is admissible from this witness is what the Secretary of Agriculture told him as to the figures, as to the contents of the report, before it was issued. I cannot see why it is impossible to frame a question on those lines.

151

The COMMISSIONER: You can answer that question.

A. Well, on one occasion he did in substance tell me what a report would be before it was issued and that was during one of a number of conversations that I had with him.

(By the COMMISSIONER:)

Q. About what time was that?

A. On June 6th, as Secretary of the Southern Cotton Association I preferred charges against the Statistical Bureau of the Department of Agriculture; I presented my charges on June 6th and during the next few weeks we had a number of conversations regarding the reports.

Q. That was on charges that you preferred?

A. For the Southern Cotton Association and in regard to reports generally. We went into the matter very fully.

Mr. DORR: I think that this answer shows how incompetent this testimony is even as to the alleged issue itself. Here is a case where the head of a manufacturer's association apparently goes to
152 the Secretary of Agriculture——

Mr. FULLER: The Cotton Growers' Association is an association of the cotton growers of the whole United States.

Mr. DORR: Let me withdraw that and substitute—the head of the organization of all the cotton producers of the whole of the United States goes to the Secretary of Agriculture and charges that the statistical department of his office is being run on a——

The COMMISSIONER: Whatever became of the charges?

Mr. FULLER: Here they are before you now as a result.

Mr. DORR: And in response to that this witness says on one occasion this witness talked to the Secretary of Agriculture and saw him as to the contents of the forthcoming report. Now evidently this conversation——

The COMMISSIONER: I will allow it in and strike it out afterwards.

By Mr. GANS:

Q. Now I will ask you whether the report with respect to which you had a conversation with the Secretary was thereafter issued?

A. It was.

Mr. DORR: I object to that unless the proof that it was issued in the form the secretary——

153 Mr. GANS: I am going to ask him that. When I join two questions in one you object and when I don't you object.

Q. You saw that report?

A. I did.

Q. Was it in conformity with what the secretary told you it was going to be?

A. It was.

Q. How long after your conversation with the secretary was that report issued, about?

A. Well, I had several conversations in regard to it with him.

The COMMISSIONER: He is asking about the time.

A. Well, I might say within a week after the last conversation I had with him; about I think a week or 10 days.

Q. You were not at that time in any way connected with the Government?

A. I was not.

Q. And not in the Bureau of Statistics or in the Department of Agriculture?

A. No sir.

Q. Was this information which the secretary gave you in reference to the percentage of reduced acreage?

A. It was.

Q. This report that was subsequently issued was different in its figures from the report of June 2, 1905?

A. It was.

Cross-examination by Mr. DORR:

Q. At present you are on the Atlantic Cotton Journal?

A. Manager.

154 Q. What is your present occupation?

A. I am business manager of the Cotton Journal published in Atlanta, Ga.

Q. Do you know whether Mr. Price is interested in that paper or not?

A. I know he is not.

Q. How do you know that?

A. I am a stockholder in it and business manager.

Q. These conversations that you had with the Secretary of Agriculture, all grew out of and were in relation to the charges which you had preferred against the Statistical Bureau?

A. Not altogether; principally they were.

Q. Did you ask him in your personal capacity what the contents of the forthcoming report would be?

A. Well, no sir; didn't ask him what the contents would be.

Q. Is it not a fact that whatever was said at that time about the probable contents of this area report was said in relation to the charges that your association preferred?

A. Well, partly so and partly not; that brought about the conversation with him—was in regards to that report.

Q. In regard to that report?

A. Yes; the one that was——

Q. And you had charged that the report which had been issued was false?

A. I did.

Q. And this conversation as to the forthcoming report was
155 as to the supplemental report which was supposed to be issued in correction of the previous report?

A. It was.

Q. And you had asked the department to issue such a supplemental report?

A. Yes.

Q. This supplementary report was not one of the stated reports, was it?

A. I don't understand you.

Mr. GANS: I think I will have to object to that because I don't think the witness can testify to it.

Q. This report as to which you had this conversation as to its probable contents, was a report supplementary and in correction of the previous regular report, was it not?

A. Well, it was understood to be a regular report.

Q. When was it issued?

A. It was issued in July; July 25th I believe. I am pretty certain July 25th.

Q. And it was the report which grew out of—which was issued for the purpose of correcting the previous report?

Mr. GANS: I object to that.
The COMMISSIONER: If he knows.
Exception taken by Mr. Gans.

A. It was as I supposed a correct acreage report.
Q. You had alleged that the regular acreage report was incorrect and false?
A. I had.
156 Q. And you asked the department to correct it?
A. I did.
Q. And in conversation with you, after consultation with and on information furnished by you, a corrected report was issued, was it not?

Mr. GANS: I object to the phrase "corrected." He said a different report.

Q. A new report was issued?
A. A new report was issued. Whether it was on information furnished by me or not, I couldn't answer that.
Q. You were consulted, were you not, as to the information you had in your possession?
A. No sir, I was not.
Q. Did you furnish any information?
A. Except the figures I had already gotten out in a previous report.
Q. And you discussed the basis of those figures, did you not?
A. To a certain extent, yes.
Q. That is, you came to Washington with a charge that the reports which had been issued were false and that you had information which you had gathered and which you yourself had published which showed it to be inaccurate?
A. That was the basis on which I made my charge partly.
Q. And after consulting with you, after taking your statements, this new report was issued?
A. I don't remember of having anything that led me to
157 believe that it was my statement that——
Q. That is not the question I asked you. (Question read.)
A. Yes.
Q. You knew that the Statistical Bureau at that time had been thrown into a state of some disorganization through the departure of Mr. Hyde and the dismissal of Mr. Holmes?
A. Yes.

Mr. GANS: I object to that because it assumes a fact not in evidence and a fact which I think the examiner is mistaken about. I don't think that at this time Mr. Hyde had——
Mr. DOBB: Yes, he had.
Mr. GANS: He answered before he understood the question I think. I want to give him an opportunity to reflect on the proposition of whether he knows. The point I want to make is that I want the witness to address his attention in answering the question was as to whether at the time of these conversations had Mr. Hyde

already departed and Mr. Holmes had been removed. If so, why then, if he knows that to be a fact, then the answer may stand. Do you know that, Mr. Witness?

Mr. DORR: The witness has already answered the question. I submit he should be left to his own counsel on redirect.

158 Mr. GANS: He has testified about certain conclusions before I had an opportunity to object to it.

The COMMISSIONER: I will allow the question.

Mr. GANS: I want the question phrased merely so that he can answer whether he knew that Hyde and Holmes——

The COMMISSIONER: That is what he has answered.

(By Mr. GANS:)

Q. As a matter of fact, Mr. Cheatham, do you know whether at the time these conversations were had that we have referred to, Mr. Holmes was out of the department?

A. Well, during some of them he was not out of the department and during other conversations he was.

Q. Had Mr. Hyde gone at that time as far as you knew?

A. The same applies to Mr. Hyde.

Q. Now when this report came out what relation did the reduction on acreage in the report bear to the figures that you had given out to the figures of the original report?

A. Well, our report made the acreage reduction—that is, the report of the Southern Cotton Association of which I was Secretary, made the reduction in acreage 18.1% for that year; the department's report which was issued on June 2nd or 3rd—June 3rd I think—made it 11.4%.

Q. That is 7% difference?

159 A. 7% difference in the amount of reduction of acreage.

Q. Now, what was the so-called revised report; what did that make it?

A. 14.9%.

Q. In other words, half way between the two?

A. Just half way between the two.

(By Mr. DORR:)

Q. Do I understand you to testify that the Secretary of Agriculture told you in advance of the publication of the July report that this supplemental report would show a reduction of 14.9% in acreage?

A. In substance that is what he told me.

Q. He mentioned the figure 14.9?

A. No sir, he did not. He told me in substance that he would satisfy all parties concerned; there seemed to be a difference of opinion regarding it; some parties claimed that his report was right, our organization claimed that ours was right, and that he would satisfy all parties.

Q. So that when you say he gave you this advance information you mean that he told you he would satisfy all parties in the forthcoming report?

A. And I understood it to be a division, or split the difference of the two reports.

Q. That is, you assumed that that is what he meant when he said he would satisfy all parties?

A. I don't remember the words verbatim or anything of
160 that kind, it has been some time, but that was the way I understood it.

Q. So the advance information that he gave you was that the supplemental report which had been made up after the receipt of the charges you had made would satisfy all parties?

A. In substance that was the information.

Q. That was the information he gave you?

A. Yes.

(By Mr. GANS:)

Q. You say that the impression you carried away with you was that the report would be half way between the two figures; was that impression based on things the Secretary said to you?

A. Yes.

Mr. DORR: I object to that. The witness has already testified he cannot remember what the Secretary said, and his impression is certainly a pretty poor basis to attack the integrity of the Secretary of Agriculture as is being done in this case.

Mr. GANS: The only person who has attacked the integrity of the Secretary of Agriculture is Mr. Dorr. I say he was doing something he was entirely authorized to do and in pursuance of a general practice of the department.

Q. When you say that you carried away the impression from your conversations that he had said the forthcoming report would
161 be half way between the two figures submitted to him, do you mean by that that that was the substance of the conversation, taking it as a whole as you remember it?

A. He gave me to understand that.

Mr. DORR: The witness has already testified that he cannot remember what he said.

Mr. GANS: He said he cannot remember his words, but I am asking the substance.

The COMMISSIONER: The impression he had on his mind he said.

The WITNESS: I went off and left his office and told friends of mine that that would be the figure.

The COMMISSIONER: From what he told you?

The WITNESS: From what he told me. What I gathered from his conversation. The words he used in telling me I don't remember, but I was assured in some way; so much so that I knew that 14.9 would be the figure before the report came out.

Mr. DORR: As you guessed it?

The WITNESS: No, I didn't guess it. I had reason to believe it.

Mr. FULLER: And when the report came out was it 14.9?

162 The WITNESS: It was.

Mr. DORR: I again move that this testimony be stricken out. Decision reserved.

Hearing adjourned to Tuesday, January 12th, 1909, at 2 P. M.

163 Before John A. Shields, Esq., U. S. Commissioner.

UNITED STATES
vs.
THEODORE H. PRICE.

NEW YORK, *January 12th*, 1909.

Hearing resumed pursuant to adjournment.
Present: The Commissioner & Counsel same as before.

Hearing further adjourned to January 19th, 1909.
Hearing further adjourned to January 26th, 1909.
Hearing further adjourned to Thursday, February 11th, 1909.

164 Before John A. Shields, Esq., U. S. Commissioner.

UNITED STATES
vs.
THEODORE H. PRICE.

NEW YORK, *February 11th*, 1909.

Present: The Commissioner; Jesse C. Adkins, Esq., G. H. Dorr, Esq., for the Government; Howard S. Gans, Esq., for Theodore H. Price.

VICTOR H. OLMSTED, being duly sworn, testified as follows:

Examined by MR. GANS:

Q. Mr. Olmsted, where do you live?
A. In Washington City.
Q. And what is your official position at the present time?
A. Chief of the Bureau of Statistics of the Department of Agriculture.
Q. Is that the same function as was fulfilled by the Statistician of the Bureau?
A. That is another title; it is Statistician and Chief of the Bureau.
165 Q. How long have you been connected with the Bureau of Statistics in the Department of Agriculture?
A. I was appointed first there as Assistant Statistician sometime in 1901.
Q. And how long—what positions have you filled in that Department?
A. Now, I thought probably you would ask me that question and I have brought a little paper along to refresh my memory from.
Q. Read it from that?

A. Appointed April 23rd, 1901, as Assistant Statistician; on December 31st, 1901, I resigned and went into private business. On June 12th I was again—June 12th, 1902, I was again appointed as a clerk, class 4. July 9th, 1902, I was made special field agent. October 13th, 1902, I was granted leave without pay to assist in taking of the Philippine census. April 1st, 1904, that leave was terminated and I was appointed Chief of the Division of Domestic Crop Reports. July 8th, 1905, I was promoted to the position of Associate Statistician. June 16th, 1906, I was appointed Statistician in Chief of the Bureau.

Q. And that position you now hold?

A. I now occupy. Was away from that about a year and a half. Do you care for that?

(By Mr. ADKINS:)

Q. What date was that?

A. I was Chief of the Division of Domestic Crop Reports
166 on April 1st, 1904.

(By Mr. GANS:)

Q. During the period that you were connected with the Bureau the Bureau was getting out a cotton report, was it not?

A. It was.

Q. And you are familiar, are you not, with the methods adopted by the Bureau in getting out the reports?

The WITNESS: Yes, during the time of my connection with the Bureau.

Q. And up to that time also you are familiar with the various sources of information which the Department had?

A. Yes sir, I am.

Q. Now, among those sources of information there were, were there not, seven classes of information—seven classes of correspondents?

A. There were.

Q. Those classes were designated, were they not, as Township correspondents, County correspondents, State Statistical Agents, State Field Agents, individual farmers, and in some of the States—in the cotton States, Special Cotton correspondents?

A. Yes, sir, and cotton ginners; that made 7.

Q. And Cotton Ginners, the seventh?

A. Yes sir.

167 Q. And these were—these various classes of correspondents sent in from time to time information with regard—affecting the cotton crop?

A. Yes sir.

Q. Now, the information that was sought from them included among other things, did it not, acreage and condition and the acreage—both these matters were reported in percentages, were they not?

A. Yes sir.

Q. And the acreage was reported in percentage as compared to the last year's condition at the same time?

A. Last year's acreage at the same time.

Q. Yes; and the condition was reported in a percentage as compared with what was designated as a normal condition of 100?

A. Yes sir.

Q. And what do you mean by a normal condition?

A. A normal condition is such a condition as gives promise during the growing season of a full crop. That is the best definition perhaps that I can give.

Q. Well, then if you took any particular locality as compared with any other particular locality, the normal condition would mean a different amount of cotton per acre, would it not?

A. Oh, yes; the full crop would not be the same in two different localities; it might be very vastly different.

168 Q. Now, then coming to the various classes of correspondents, it is true, is it not, that of the township correspondents there were from two to 7 in each agricultural county?

A. Well, I don't know that—township correspondents?

Q. Yes?

A. Oh, yes; probably I would not want to be too definite about that. There are some counties that may have had more than 7.

Q. And the county correspondents—there was one in each agricultural county?

A. Yes sir. Sometimes, you will understand, that a correspondent might have been absent and the intention is——

Mr. DORR: I object to your leading him.

The COMMISSIONER: Of course, you could shorten the examination by leading. I can only sit to-day to 12:30.

Mr. GANZ: We are very anxious to get through, too; there has been considerable delay.

The COMMISSIONER: You just put your questions, and let's get at it.

Q. Now, did these correspondents—these county correspondents, receive information from what you might call special correspondents of their own?

169 A. Yes; they were expected to have two or more people as their correspondents who would advise them as to conditions in their particular sections, and they would combine that information with their own in the making up of their reports.

Q. Did the State Statistical Agents have correspondents of their own?

Objection by Mr. Dorr. Question allowed.

A. They did have some correspondents.

Q. And could you give an estimate off hand of the number of special correspondents that the State Statistical Agents had; I suppose they had a variety of them in the various states?

A. I could not do that now; I would not want to trust my memory on that.

Q. Would they run in tens or thousands?

A. Hundreds in each State. We didn't have a State Statistical Agent in Florida.

Q. Then what did the special field agent do?

A. The special field agent concerning whom you inquire, who was employed up to 1905, I suppose?
Q. During this period, yes?

Mr. DORR: The time when you were personally connected with the Bureau.
Mr. GANZ: I will limit it to a time——

170 (By the COMMISSIONER:)

Q. How long have you been there, Mr. Olmsted?
A. Since 1901, off and on.

(By Mr. GANZ:)

Q. I will limit my question now from October 1904 to July 1905. What did the special field agent do?
A. He travelled throughout the cotton belt securing information for the use of the Chief of the Bureau in preparing estimates.
Q. Now, the special correspondents that you had in the various States, what class of people did they consist of?
A. They were principally dealers, merchants, agricultural implement men and bankers, commission men, and men of that sort. Men of that general class as distinguished from farmers; men who were supposed to have knowledge of crop conditions.
Q. That is, whose business brought them in touch with crop conditions in such a way as would make their information valuable?
A. Yes sir.
Q. Now, when the township correspondents reported did they report as a result of having gone over the territory in their township and measuring acre and acre or acre by acre the amount that there was in the township.

Objected to by Mr. Adkins and Mr. Dorr. Objection sustained by the Commissioner as to the form of question.

171 Q. When the township correspondent reported did he report mathematically—as a result of mathematical computations of the acreage in his county?

Objected to by Mr. Adkins as leading. Question allowed.

A. These reports were from voluntary correspondents and were not understood to be mathematical results or results of measurements.
Q. Were they understood to be the results of any averaging on their part of the informaton that they received from their special correspondents?

Objected to by Mr. Adkins. Sustained. Exception.

Q. What was the method of the township correspondents' reports, seeing that it was not mathematical?
A. They reported their opinions and beliefs.
Q. Now, then coming to the county correspondents, I ask the same question that I asked with regard to the township correspondents; did they report as a result of a mathematical computation?

Objected to by Mr. Adkins as indefinite and leading, and not proper as to form. Objection sustained. Exception taken by Mr. Ganz.

172 Q. Directing your mind as to whether their reports were made as a result of mathematical computation or an expression of opinion, can you tell me what the county reports represented?

A. They represented replies to such inquiries as were made to them—the results of their observation and opinions and impressions. There was no requirement under any rules of the Department that these voluntary correspondents should go to the trouble of making surveys; they are paid nothing you understand.

Q. Now, directing your mind to this question: I understand that they had before them, as you have testified, reports of their special correspondents. Were there any rules of the Department requiring that they should report the average of the reports of their special correspondents?

Objected to by Mr. Adkins.

Mr. Ganz: My object, in view of the Commissioner's statement that he wants to shorten this hearing so as to get away to-day, is to bring out the essential facts with regard to the method of preparation of these reports, and to get through with this proceeding, if possible, before the Commissioner adjourns; and in view of the fact that the witness has already testified and other witnesses

173 have already testified in other proceedings with regard to all these matters, and that there cannot be any dispute about them. We can shorten this matter very much in bringing out what is true and what is deemed essential to the Defendant's case by simply leading to a slight extent. But of course, if the Government wants to delay the proceeding, why, of course, there is no way of preventing it.

Mr. Dorr: The Government's position is that Mr. Olmsted is thoroughly familiar with the organization of the Department and is more familiar than counsel can possibly be, and if he is asked questions directly without being leading as to the workings of the Department, so far as they may bear on the issues in this case, in that way this proceeding can be much more expedited than by asking questions partly accurate and partly inaccurate as put by counsel.

Mr. Ganz: There has been just one question that counsel has asked that has proved to be inaccurate.

Q. Will you take up these various classes of correspondents, and directing your attention to the question as to whether their reports were made up as a result of mathematical computations or as a result of expressions of opinion by them or by their special correspondents, tell us how the reports were made up?

174 A. The reports of all classes of correspondents, coming to the Bureau, were based on observation and inspection and general knowledge of the situation, without resorting to any consus methods of enumeration or survey or actual count. These correspondents who do special corresponding as county correspondent or

State Statistical Agents use the information that comes to them as a basis for their reports, but none of those reports are based on any actual survey or enumeration.

Q. Do you know, Mr. Olmsted, the County reporter or the State Statistical Agents in sending in their reports to the Bureau if they base them on mathematical averages of the reports they get, or——?

A. Oh, I don't know that. I know that the State Statistical Agents since I have been in charge of the Bureau, tabulate the reports they receive in a scientific way, but how they did it in 1905 I don't know; but I think they tabulated and used the results of their tabulation combined with their information and knowledge. There was no actual count or enumeration of actual acreages or yields or any other subject concerning which inquiry was made in the field as would be done under census methods.

Q. So that if I understand you correctly, with respect to each class of correspondents, that which they sent in was an estimate, was it not?

A. Yes sir.

175 Q. And when you speak as you did in your last answer as to their use of their own knowledge, you mean, do you not, their information received second-hand?

A. No, not wholly; their own observation combined with their own information—their reports being based on their own knowledge and information combined with information gained from other sources.

Q. By observation you don't mean to qualify what you said about their not using any survey methods?

A. *Of*, no; observation means general view.

Q. What would you characterize as observation—would you class as observation travelling through the State?

A. Field agents travelled through the States and looked at the crop and examined the fields and talked with people and consulted with those who were well informed, and based on the information they could give and on his own knowledge he made his reports. The idea being that those reports were all estimates.

Q. Precisely. Now, for the purpose of getting the results of those various estimates, were written inquiries sent out?

A. Printed schedules were sent out.

Q. And in about what time in each month were they sent out?

A. Well, the reports were to be made as of the 25th—

176 20th or 25th of each month. The schedules were sent some time before that with the return envelopes to enable correspondents to properly use them and return them by mail so as to reach the Department within a few days after the 25th or the 20th, whatever the time was.

Q. The object was to return the reports by the 25th?

A. No; the reports related to the 25th.

Q. In what months of the year were cotton crop reports issued?

A. They were issued six times during the year, in June, July, August, September, October and December, as a rule each report relating to the latter part of the preceding month.

Q. Were all these classes of correspondents addressed for each one of those reports?

A. No, no; the seven sources of information were utilized on securing data relating to acreage and for the last report relating to yield. For the other reports only four classes were used. Shall I name them? They were the field agent, the State Statistical Agent, County Correspondent and township correspondent. The reports during the intervening months relating to the condition of the growing crop.

Q. Would there be any possible mathematical way of giving an estimate of the condition—I mean would it be accurate?

Objected to by Mr. Adkins; sustained; exception.

177 Q. Will you tell us what was done with those reports in the way of tabulation, etc., after they came to the Department?

A. The reports of the field agent and the State statistical agent were handled by the chief of the bureau or his immediate assistant. The reports received from the voluntary correspondents, township and county and other correspondents were received in considerable numbers and they were tabulated in the Division of Domestic Crop Reports and the results were secured on each class independently of every other class of each State. Those results were turned in by the Chief of the Division of Crop Reports to the Chief of the Bureau for his use in making his estimate.

Q. What was the method of tabulation—take each class of reports and tell us?

A. The county correspondents' reports were tabulated by counties, each county being weighted——

Q. Will you explain what that means?

A. That means an effort to give to each geographical subdivision of a State the relative importance to which it is entitled. For example, if a county produced double the quantity of any given product produced by another county, that county will be entitled to twice the consideration in striking an average that the other county would be entitled to.

178 Q. Now, let me ask you, was it based on the production of the county, the weights, or was it based on the amount of acreage in the county?

A. It was based on a combination of the two—average production for a series of years at that time, as I recollect it now, combined with the acreage yield.

Q. Where did you get the figures from which you ascertained the weights?

A. The county weights or the county figures were based on figures derived from the reports of the census bureau.

Q. Did the census bureau report anything but acreage figures?

A. The decennial census.

(By Mr. PRICE:)

Q. Is there any census report of acreage?

A. Decennial; the decennial census of 1900 reported the acreage.
Q. Does that give the acreage by County?
A. I think so.

(By Mr. GANZ:)

Q. These weights were obtained then by a basis of using the last decennial census of acreage for the particular crop of a particular county?
A. For cotton, originally, yes, but according to my recollection in 1905 the estimated yield per acre was combined with the production figures of the ginners' reports issued by the census bureau.
Q. Which were averaged——?
A. My recollection is that they took two or three years' production and averaged them.
Q. Will you give us an illustration showing how you would get the weight for a particular county?
A. I am not sure that I can do that clearly at this time. My recollection is that this was the method: The estimated acreage yield for the State was combined with the production—the average
179 production of the counties the resulting figures would give a weight for each county, indicating to some extent its relative importance as compared with other counties as a cotton producer.

(By Mr. ADKINS:)

Q. Is that what you did in your county reports?
A. That is the county report. Each county had its relative importance—relative weight in the report for the entire State.
Q. Production with acreage yield?
A. Yes sir.

(By Mr. GANZ:)

Q. One of the elements in the determination of this weight was the averaging of ginners' reports for a series of years?
A. That is my recollection now. It would not have done, as I remember it, to take one particular year, as the crop might be large or small, in different years.
Q. Do the ginners' reports represent absolute accuracy of cotton production or approximate production?

Objected to by Mr. Adkins.

Q. You receive ginners' reports of your own?
A. From the census reports—ginners' reports, yes, twice in each year.
Q. You are familiar with the method of cotton production, are you not?
A. I am not a skilled man in cotton producing or in any other crops. The bureau of statistics deals with a variety of crops, statistically.
180 Q. And you know what opportunity he would have for knowing the crop that was harvested in his particular district?

Objection by Mr. Dorr as to form.

Q. Now, then after ascertaining this weight for each county what would you do with the reports as they come in?

A. The figure reported by the correspondents for any particular county would be multiplied into the weights and the extension resulting from all these multiplications would be added together and they would be divided by the sum of the weights which would give what we call a weighted average as distinguished from a straight average.

Q. Now, that was reported so far as acreage is concerned in percentage?

A. Yes sir.

Q. Relative to the acreage of the previous year?

A. Yes sir.

Q. Was the same thing done with respect to condition?

A. Exactly the same; the same method of tabulation was adopted.

Q. Now, then take the other classes of reports?

A. Well, all the voluntary correspondents' reports were tabulated in this method. As to the State Statistical Agents' reports
181 and Field—special field agents, they were not; they were handled directly by the chief of the bureau and were used in connection with those other reports.

Q. Now, was there any weight attached to the reports of the other correspondents?

A. You mean were they mathematically weighted?

Q. Yes?

A. No; because these other people reported for the entire States.

Q. I mean the State Statistical Agents?

A. Just such weight as the Statistician saw fit to give it.

Q. I mean mathematical weights?

A. No.

Q. That you arrived at for the purpose of getting the estimates of the voluntary correspondents?

A. No.

Q. Now, when all these reports were in what was done with them for the purpose of final tabulation of the report?

A. Final estimate of the Bureau?

Q. Yes?

A. They were entered each class in its own column on a sheet prepared for the purpose and in parallel columns—for example, take the State of North Carolina. In one column would be entered the report of the special field agent for example, and the next column that of the State Statistical Agent, and in the next column the county reports, and in the next the Township, and so on for each
182 State right down the table, so that the Statistician would have before him the results of all those different classes of reports.

Q. In sending these reports did the various correspondents confine themselves to sending in their own opinions or did they send in from time to time other matter reflecting the opinions from other sources?

A. Sometimes other matters were sent in, yes sir, directly by the State Agents and from the Field Agents; that is my recollection.

Q. Now, then coming to the field agent, does he after making his previous report report his estimate of condition and acreage?

A. He would report on whatever subject might be inquired into from month to month.

Q. Who was it that made the final estimate which produced the report of the Department?

A. The Statistician.

Q. And what was the method pursued by the Statistician in making up that final estimate?

A. His method was to take this sheet that I have just told you of and on which all the results were tabulated in parallel columns, and taking into consideration the relative value of each class of reports and he would fix a final figure for each State.

183 Q. That is, he would make an estimate?

A. Yes sir, based on those other estimates.

Q. Now, then would these estimates of his be based solely on these reports of correspondents or would they be based on other matters?

A. I am not prepared to say about that. I suppose he would be gaining information from any source that he could, but theoretically they would be based on those reports.

Q. Now, let me refresh your recollection in regard to that matter. You testified on the trial of Edwin S. Holmes, Jr., in the District of Columbia, did you not?

A. Yes sir.

Q. And do you remember that on that trial——

Objected to by Mr. Adkins.

Q. And you remember having given this information?

Mr. ADKINS: Objected to as to whether he gave it or not; it is not material.

The COMMISSIONER: Ask the question.

Q. Then in connection with that, after referring to these various reports, you said "That the Statistician would use information that he could gain from other sources, from letters written to him, from interviews with people, from special trips he would have made by employees to investigate some particular points and from a

184 variety of sources—anything that came to his mind or knowledge that he considered worthy of credence?"

A. That was right; I now remember; that is so.

Q. And that is true?

A. Yes sir, that is true; I now remember it.

Q. So that in arriving at his final figures, in accordance with the method that prevailed in the Department at the time we are referring to, there was no obligation to fix a figure which corresponded exactly with that of any of those classes of correspondents, was there?

A. No.

Q. Nor a figure that was the average of the reports of the various classes of correspondents?

Objected to by Mr. Dorr as leading. Sustained. Exception taken.

Q. Was there any obligation to fix as a final figure arrived at by the Statistician a figure that was the result of an average of the reports?

Objected to as calling for a conclusion. Allowed.

Q. What was the practice?

A. The practice of the Statistician was to take these figures which were placed on a sheet in parallel columns——

Q. I mean with regard to averaging?

Objected to by Mr. Dorr.

185 Q. What was the practice, Mr. Olmsted, in arriving at the final figures with respect to averaging the returns from the various correspondents?

A. The practice was not to average them, but to consider them one in relation to the other and the relative value to be attached to the different classes of reports and to fix a figure, as I remember, within the limits of the figures before him which, in his opinion, represented what ought to be the correct figure for each State.

Q. Now, taking his functions as you know them, was there any reason why he should fix within the limits of the figures before him if he had information which challenged the accuracy of the figures?

Mr. ADKINS: Objected to as too indefinite and argumentative.

A. I don't know of any such case ever arising as far as my knowledge goes; I cannot tell that; he did it all himself; what he was guided by or just how he was controlled, I cannot say.

Q. It is a fact, is it not, as you have just stated, that the final figures were a matter of his individual judgment?

A. Yes sir, I said that.

186 Q. And in arriving at that judgment did he take into account such facts as his personal estimate of the accuracy of the various classes of correspondents?

A. Yes, sir; the relative value to be given to each class was taken into consideration.

Q. Was there any—do you know whether there was any general basis of estimate with regard to the comparative accuracy of the township and county correspondents or with regard to any tendency on their part to underestimate in their estimate?

A. Yes; Mr. Hyde had a theory that the larger the field a man covered the more likely he would be to represent the facts, and he gave more weight to the Field Agent than the State Agent; and in valuing the reports of State Agents and those of the county correspondents who had some assistance in making up of their reports, he thought that their estimate of the crop might be of somewhat greater value than those of the township correspondents.

Q. Were there certain of these correspondents as to whom he thought their reports might be influenced by bias one way or the other?

A. I cannot say that.

Q. Let me ask you this. Was it not a general understood fact or was it a fact that Mr. Hyde had spoken of in the preparation of his report, that some of these correspondents would be naturally interested in having the crop appear small rather than large?

187 A. I think that he did have an impression that people who were directly interested in the crop might want to sway it one way or the other. I don't know as I share in that particularly; that was his general idea.

Q. That was one of the elements that he spoke of as one of the elements to be taken into account?

A. More particularly as I have said the element taken into consideration was the scope of their observation.

Q. But the other was taken into his account?

A. I don't know that.

Q. Don't you remember of his speaking about it?

A. I seem to have a recollection about it, but I cannot be definite.

Q. Were you familiar with the things that *was* done by the Associate Statistician during the period

A. To some extent.

Q. Except in the absence of the Statistician he didn't make up the reports?

A. That is right; he only made them when the Statistician was away.

Q. Was there any way in which he could affect the figures of the crop report, except by way of advice or suggestion?

A. When the Statistician made them up?

Q. Yes?

188 A. I don't see how he could inasmuch as the Statistician fixed the figures and signed the report. He might be possibly influenced; I don't know.

Q. Let me ask you this. Taking the result of the method of making up the report, if any two men had the same figures before them from various classes of correspondents and both were endeavoring to do their duty to the best of their ability, would it be reasonably possible for them to arrive at the same figures?

Mr. ADKINS: Object to the question in that way. That is something that we can all answer.

Mr. DOBE: It clearly calls for a conclusion.

Mr. GANZ: I withdraw the question.

Q. Mr. Olmsted, during the period that we have been referring to, did the Department receive from time to time requests for information with respect to various matters other than the cotton crop report?

Objected to by Mr. Adkins. Sustained. Exception.

Q. Prior to July 1905, Mr. Olmsted, had you any information with regard to any written rule of the Department forbidding the

giving out of information by the employees of the Department regarding the cotton crop reports or anything else?

189 Same objection, ruling and exception.

Q. Do you know whether there was any written rule of the Department forbidding the giving out of information with respect to data in the Department?

Mr. ADKINS: Objected to.

The COMMISSIONER: In regard to cotton?

Mr. GANZ: A general rule, and that will cover cotton as well as anything else.

Objection sustained. Exception taken.

Q. Are you familiar with the records of the Department with respect to the rules in force in the Department?

A. Yes, I have a general idea of them as far as they apply to my Bureau.

Q. As far as they apply to the Bureau of Statistics?

A. Yes.

Q. And you were familiar with the rules in force in your Department in 1904 and 1905?

A. Yes.

Q. About how many people were there associated with the Department as voluntary correspondents and others?

A. My recollection is that along about that time there were upwards of 200,000 listed in different lists.

Q. Mr. Olmsted, do you remember being present at the
190 time when the reports were—when the final tabulation of the report was being made up at a time when a person not associated with the Department was present?

A. Not prior to June 1905.

Q. Well, take it subsequent to that time?

A. I remember that on one occasion when—after Mr. Hyde severed his connection with the Bureau while Assistant Secretary Hays was in charge of the Bureau that there was a gentleman present during the day and the time when the final estimate of the Bureau was being prepared. He came in in the morning and stayed locked up in the room until the report was promulgated.

Q. And he was in a position, was he not, to have seen all the figures that were put down on the report before that?

A. Yes sir, but could not use them of course, because he was locked up in there as well as the rest of us were.

Q. But he could see them?

A. Yes sir.

Q. Do you know of any other occasion?

A. No; I don't recall any other.

Q. Were you present at sometime in 1904 when several Congressmen were present at the time when the report was being made up?

A. No sir, not with several Congressmen.

Q. Well, a congressman?

A. A congressman was present in 1905, the one I have re-
191 ferred to.

Q. On this prior occasion?

A. No.

Q. Who was this member of Congress present?

A. He was Representative Burleson.

Q. From where?

A. He is from Texas.

Q. Do you remember any occasion when Mr. Harvey Jordan, President of the Southern Cotton Association, was present at a time when these reports were being tabulated?

A. No; I don't recall any such occasion as that.

Q. Now, then taking the final figures that were arrived at, would you say that it was a fair statement of what it consisted of to say that it was the Statistician's estimate based upon a number of other estimates submitted and upon his own information derived at second-hand from other sources?

Mr. DORR: Objected to because it is asking for a characterization and not asking how and what was done.

Mr. ADKINS: The witness has stated how things were done and what was done and I submit it is entirely proper.

Mr. DORR: I object to it further as leading in form.

Objection sustained. Exception taken.

192 Q. So that there may be no mistake about it and that we may understand it. It is a fact, is it not, Mr. Olmsted, that each one of these classes of correspondents that we have referred to reported his estimate and opinion?

A. That is correct.

Q. And that is all that these reports amounted to, an estimate or opinion based upon second hand information and a certain amount of observation as you have described?

Objected to by Mr. Dorr. Overruled.

A. That was the basis of the reports, yes sir.

Q. You have understood, have you not, Mr. Olmsted, that the reports I have been referring to throughout have been reports relating to the cotton crop, and what you have been testifying to relates to the cotton crop reports?

A. That is my understanding.

Q. Have you ever assisted at making up one of these reports when Mr. Hyde was actually making it up?

A. I have been in the room early in my employment there to see his methods.

Q. Have you made independent estimates of your own while he was making his independent estimates?

A. No sir; I simply watched his methods and learned how
193 to do the work when he was absent.

Q. But of course you would not expect an independent estimate of yours to agree with an independent estimate of his?

Objected to by Mr. Dorr. Sustained. Exception.

Q. Do you know in any way in which your estimate or anybody else's could correspond with Mr. Hyde's estimate?

Objected to by Mr. Dorr. Sustained. Exception.

(By Mr. ADKINS:)

Q. Did you say, Mr. Olmsted, that Representative Burleson was in there on that one occasion after this trouble in 1905, and that he is from Texas?

A. Yes sir.

Q. And he is on the Agricultural Committee of the House of Representatives?

Mr. GANZ: That is objected to. The Committee on which a member of the House of Representatives is serving is a matter of record in the House of Representatives.

Question allowed. Exception taken.

Mr. GANZ: I object to it on the ground that the Committee on which a member of the House of Representatives is serving is a matter of record in the House of Representatives, and that the witness has no means of knowing that; and that it is incompetent, irrelevant and immaterial.

194 The COMMISSIONER: The question is allowed if it is within this witness' knowledge.

(By Mr. GANZ:)

Q. Have you any means of knowing, except by hearsay, what Committee Mr. Burleson served on?

A. I could find it out by reference to the records; I don't recall at the present time.

Mr. GANZ: I press my objection.

The COMMISSIONER: I think your objection is good as to that.

(By Mr. ADKINS:)

Q. Do you know whether he is on the Appropriations Committee or not.

Mr. GANZ: That is immaterial.

Q. All you know as a matter of fact of your own knowledge that Representative Burleson was on either the Agricultural Committee or the Appropriations Committee of the House and that he took a great interest in the preparation of the cotton report and that his visit down there on one occasion was to see how the report was prepared in his official capacity?

A. I will say that I know Mr. Burleson took a great interest in the workings of the Bureau and that he was there on that occasion for the purpose of gaining a full understanding of the methods of the Bureau.

195 Q. And that his visit was made there in the course of his Congressional duties?

Objected to by Mr. Ganz. Sustained.

Q. Mr. Olmsted, there has been a great deal of mention of Mr. Hyde, but I think it appears in no way who he was. Who was he?

A. Mr. Hyde in June 1905 was Statistician and Chief of the Bureau.

Q. How long had he been there?

A. He had been Chief of the Division prior to its creation into a Bureau—before my time.

Q. Since 1901 to your own knowledge?

A. Yes sir.

Q. When did he sever his connection with the Bureau?

A. Well, sometime between the early part of June and the latter part of July—I don't remember the exact date, but it was within a period of 60 days.

Q. Do you know under what circumstances he severed his connection?

A. He resigned.

Q. Was it after the trouble he resigned?

A. Yes, it was after.

Mr. GANZ: I move that that be stricken out.

The COMMISSIONER: Let it go.

Mr. GANZ: Exception.

196 Q. You have testified that these reports were issued six times in a year?

A. Yes sir.

Q. The first report was issued around the 3rd day of June and it purported to cover the period up to the 25th?

A. Related to the 25th of May.

Q. Now, before that June report——?

A. Of course, you understand questions regarding the acreage covered the whole season, but as to the condition it related to the 25th of May.

Q. It covered the acreage of cotton actually planted?

A. Yes sir, and to be planted.

Q. It also covered the condition?

A. Condition of the growing crop.

Q. Now, for that report you say you had seven reports—seven reporters?

A. Seven sources of information.

Q. The first was the township?

A. Yes sir; you can begin at that end if you want to.

Q. Now, the township reports were sent into your Division while you were Chief of the Domestic Division of Crop Reports?

A. Yes sir.

Q. And you had one or more correspondents from each township?

A. That was the intention to have one or more—several sometimes in the same township.

197 Q. When these reports from the different township correspondents came in they were collected together from each county?

A. Yes sir.

Q. And what weight did you give to the report of one of them for a particular county—did you make a straight average?

A. Straight average, yes sir.

Q. And then there was made or weighted an average for the entire State?

A. Yes sir.

Q. And all that in the Bureau was purely a matter of mathematical calculation?

A. Yes sir, entirely.

Objected to by Mr. Ganz as involving a conclusion.

Objection overruled. Exception.

Q. The next regular report was that of the County?

A. Yes sir.

Q. And some of the County correspondents had reports made to them?

A. Yes sir.

Q. And what consideration they placed upon the reports made to them you don't know?

A. No.

Q. But you do know that the County reports were tabulated and given a weight-average in the same way in which the township reports were?

A. Yes sir.

Q. And that was purely a matter of mathematical tabulation?

198 A. Yes sir.

Q. And in addition to these you had reports from a special class of correspondents such as farmers, merchants, bankers, etc., and when their reports came in they were tabulated in precisely the same way as you——?

A. Yes sir, mathematically, mathematical computation.

Q. And in addition you had the regular reports of the State Statistical Agents?

A. Yes sir.

Q. And the special field agents?

A. Yes sir; they went direct to the Chief of the Bureau.

Q. They didn't come to you as Chief of the Crop Reporting Division?

A. No.

Q. But to the Head of the Bureau?

A. Yes sir.

Q. I understand you to say that each State Statistical Agent was employed in the Department who was paid and that he had under him *him* a corps of correspondents?

A. Yes sir.

Q. Who made certain reports to him?

A. Yes sir.

Q. Now, what the weight he gave to the reports received from his correspondents you don't know?

A. No sir, I cannot say that.

Q. And whether his report was simply a mathematical calculation or their reports you don't know?

199 A. I know they were the basis of his reports, but to what extent I don't know.

Q. And then of course the special field agent got his information in his own way and made his report?

A. Yes sir.

Q. When did the reports from the State Statistical Agent come in?

A. They came in long about the first of the month, perhaps just a day before the Statistician made his estimate.

Q. And to whom did they go?

A. To the Chief of the Bureau.

Q. Would they go to anybody else?

A. Not that I know of. Of course, they would come to him or his representative. I think the Associate Statistician had access to them; I had nothing to do with them.

Q. The Associate Statistician saw them as soon as they came in?

A. Yes sir, he could see them.

Q. You sent in your final tabulation a day or two before the final report was made up?

A. Yes sir.

Q. And you sent that to the Statistician?

A. Yes sir.

Q. And they were equally accessible to the Associate Statistician?

A. As far as I know they were.

Q. Now, when the Statistician was not there the Associate Statistician did his work?

A. Yes sir.

Q. And when the Statistician was there he and the Associate Statistician would work in together?

200 Mr. GANZ. Objected to as calling for a conclusion, in the second place it is unintelligible.

Question withdrawn.

Q. What did the Associate Statistician do?

A. The Associate Statistician did the work of the Statistician when the Statistician was absent, and when he was present he was there consulting with him and assisting him in making up his estimates.

(By Mr. GANZ:)

Q. Now, as a matter of fact have you ever seen any such consultations or been present at them?

A. No; I have never been present at the working up of the final report when the Associate Statistician was present.

Mr. GANZ. I move that it be stricken out, what his understanding was.

Q. Have you not from time to time when the crop report was being made up been into the room where the crop report was being finally made up for a moment or two?

A. No; if I have been in there at all it was for the purpose of learning the methods.

Q. But after you became Chief of the Bureau of Domestic Crop Report Division?

A. I don't recall that I ever was.

The COMMISSIONER: The motion is denied. Give you exception.

201 (By Mr. ADKINS:)

Q. Mr. Olmsted, you say you were in there in 1901 when you were made Associate Statistician?

A. Yes sir.

Q. And you saw Mr. Hyde making up the reports then?

A. Yes sir, I saw his method of making his estimates.

Q. Did he explain to you fully the way in which it was done?

A. Yes sir.

Q. Didn't you make a report or two of your own while he was absent?

A. Yes sir.

Q. Did he see that report afterwards?

A. Yes sir.

Q. Did he go over that particular report that you made?

A. Yes, and probably one or two and perhaps more that I made during his absence and he went over them afterwards and commended them.

(By Mr. GANZ:)

Q. Were those cotton crop reports?

A. I don't know; I don't believe I ever made a cotton crop report, but I may have.

(By Mr. ADKINS:)

Q. In order to make up these other reports did you not also receive information and reports from various correspondents who corresponded to some extent with the same class of reporters in cotton?

Mr. GANZ. I object to that and ask to have it struck out. If you strike out that part about Mr. Hyde commending him
202 I don't care about the rest.

Mr. ADKINS: No; I guess it had better stay.

Motion denied. Exception.

Q. You did make cotton crop reports with Mr. Hyde under his methods?

A. No sir, he taught me his methods.

Q. And you have been over that with him fully?

A. Fully.

Q. Now, you knew just what——?

A. I know it because I know that the methods in the cotton crop reports are the same substantially as in other crops.

Q. And you knew what reliance he placed in the different correspondents?

A. Yes sir.

Q. The object, of course, of the Bureau of Statistics was to disseminate information to the people about the different crops, and one of your particular crops was the cotton crop. You have testified that the Department received each—during each month the reports from the various classes of correspondents, and that the practice in making up the report, the final report, was to make it up from this information which came in in this approved way?

Mr. Ganz: Objected to because he has not testified to any such thing. He has testified that the practice in making up the report——

Mr. Adkins: I withdraw the question.

203 Q. Will you state whether or not the practice in making up the reports was to make it up from the approved information which came in in this fashion?

Mr. Ganz: I want the witness to under-stand that. I object to it——

Mr. Adkins: I withdraw it.

Q. Will you tell us whether or not, Mr. Olmsted, it was the practice or custom of the Bureau in making up the final report to make it up from the information contained in these seven classes or reports from the correspondents that you have named or such of them as you have reported on different occasions?

Objected to by Mr. Ganz. Overruled. Exception.

A. Those reports were the bases of the final estimate of the Bureau, and other information, if credible and reliable, may have been used in connection with those reports, but those reports themselves formed the basis of the estimate of the Statistician.

Q. It was the practice then to make true and accurate reports upon the information contained in those reports that came in?

Mr. Ganz: I object to that. It involves a statement as to
204 whether true and accurate reports were made.

The Commissioner: He has given you the fact as to the basis on which the report was made. I will allow the question and give you an exception.

Mr. Ganz: I take an exception.

Question read.

A. It was the intention and the effort I am convinced to make as accurate and true report based on these sources of information I have described, as it was possible to make.

Q. Mr. Olmsted, will you state whether or not being familiar as you are with the method of making the report, the reliance which was placed by Mr. Hyde upon the different figures sent in by the several kinds of correspondents, you having that information before you—the tabulation before you—you could make a report which would approximately—would approximate the report that Mr. Hyde would make?

Objected to by Mr. Ganz. Sustained.

Mr. Ganz: I won't object to it if he will make the question exactly the report that Mr. Hyde could make. How do we know what approximately means? Approximately may mean 5% or 10% or 20%. Approximately is too indefinite.

The Commissioner: Objection sustained.

205 Q. You spoke of some newspaper clippings being sent with some reports, did those come with the reports from State Agents; you said I think that sometimes newspaper clippings came in?

A. I have seen them there with letters afterwards; I don't know what weight Mr. Hyde gave them.

Q. Did they come with reports that passed through your hands?

A. No sir.

(By Mr. Ganz:)

Q. Mr. Adkins has asked you whether you were familiar with the relative weight which was given by Mr. Hyde to the various classes of reports. I want to ask you whether that relative weight was a matter which could be stated in a matter of—in mathematical form?

A. No, it was not.

Q. I also want to ask you whether the weight given to the various classes of reports that Mr. Hyde used in making up the final estimate was a constant matter, or whether it varied? In other words, would a change in the character of a State Agent make a very——?

A. As between the different States? I think it varied; it would depend on Mr. Hyde's opinion of the knowledge of the particular class of agent that reported, in the different states.

Q. And if there was a change in the special agent he would take his general efficiency into account?

A. Yes sir. I don't recall that there was any change.

206 Q. If there was any change in the County agents?

A. The matter of changes in the Counties would not come before the Statistician. He would simply consider the results of the County Agents' reports as a whole.

Q. Could you express in figures the weight to be given to each class of correspondents—relative to each other class?

A. No, I could not.

Q. I believe you stated that the State Statistical Agents were paid?

A. Yes sir.

Q. What munificent salary do they receive?

Objected to by Mr. Adkins. Sustained. Exception.

Q. The State Statistical Agents were not required to give all their time to the matter, were they?

Objected to by Mr. Adkins. Sustained. Exception.

Q. These merchants' reports and other reports that you have spoken of that were given twice a year were of the same general character as the other reports, were they not?

A. They were estimates, yes sir.

Q. Now, you testified, as a matter of news to me, in response to Mr. Adkins' question that the report of the acreage which came in on the 25th was understood by you to be a report of the acreage not only up to the 25th but up to the first of the month?

207 A. Up to the end of the entire planting season, acreage planted and to be planted for the entire season.

Q. So that if I understand you correctly, the people—your understanding of the matter is that the people who reported were to report not merely their estimate of what had already been planted, but also their guess as to what was to be planted in the future?

A. The object was to obtain data regarding the total acreage planted to cotton during the season.

Q. Now, were there any instructions to them to report—written instructions I mean—to report the acreage other than the acreage planted up to the time of the report?

A. I think it was printed right on the schedule; I am quite positive of it. Why, the very object of the question was to gain an idea of the total acreage.

Q. That was not uniformly adhered to, was it, that basis of estimate?

A. I think so.

Q. We have on the record here some correspondence in which Mr. Hyde asserted that the acreage reported was the acreage up to the 25th of the month?

A. I don't know that; if that is true I don't know anything about it.

Q. If that is true it was not a uniform rule, was it?

A. If that is true, but as far as my knowledge goes, the object was to secure an idea of the total acreage of each season.

208 Q. Would it be possible for you to obtain one of those schedules prior to this time showing whether or not the question was asked in the form required as to their guess of the acreage planted?

A. I expect that some of those old schedules can be dug out of the records.

Q. So that, according to your understanding of this report, if a man reported on the 25th of May on acreage he was reporting not only percentage as compared with the 25th of May of the previous year, as he estimated it, but he was estimating also what the farmers were going to plant between the 25th of May and the end of the season?

A. His estimate would be a combination of both those figures.

Q. Now, you spoke of the Associate Statistician having access to the reports at a time when the Statistician was there. What access would he have—in the first place, do you know that he had access to them?

A. In a general way. For this reason, I know the mail from the paid agents come to the Statistician's office and the Associate Statistician would receive it as well as the Statistician. That is general knowledge. I cannot speak of any specific instance. And the Statistician handles those reports.

209 Q. You don't know of your own knowledge whether the Associate Statistician opened those reports?

A. I never saw him open one that I remember.

Q. Then coming back to this estimate with regard to future conditions. As I understand it, the person reporting on the 25th of May, we will say, reported his estimate of what the crop—of the acreage, the percentage of acreage, not only on the 25th of May——?

A. That is the same question you asked me a moment ago.

Q. Yes. Do you remember seeing the report of June 2nd, 1905; that was the report that created this uproar?

A. I remember having seen it, yes.

Q. Do you remember whether that report stated the total area planted in cotton in the United States up to May 25th to be about 28,120,000 acres, a decrease of about 3,610,000 acres?

A. June 1905?

Q. Is that report on file in your Department?

A. Yes sir, it is, but I have not looked at it in a long time.

Mr. GANZ: Do you have any objection to producing that report?

Mr. ADKINS: You can have it, certainly, certified copy of it.

210 Mr. GANZ: Mr. Adkins will stipulate that the witness may send a copy of the report of June 3rd, 1905, and that he will raise no objection to the accuracy and competency of it, but that he does raise the objection as to its materiality and relevancy to the issues in this case.

The COMMISSIONER: Put it in subject to all the objections that may be raised hereafter about it.

Mr. ADKINS: Yes.

Q. You don't mean to withdraw anything you have said in reply to Mr. Adkins's questions or your previous testimony?

A. Except where I made a mistake, or may have made a mistake.

Q. And when you said before in your testimony on a previous occasion when you were asked as to the making up of these reports, that the Statistician would use information that he could gain from every source, from letters written to him and from interviews with people, from special trips he would have made by employees to investigate some particular point, and from a variety of sources, anything that came to his mind or to his knowledge that he considered worthy of credence and worthy to be considered he would take into consideration?

A. No, I would not withdraw that at all.

Adjourned to Wednesday, February 17th, 1909, at 11 A. M.

211 UNITED STATES
v.
THEODORE H. PRICE.

NEW YORK, *February 17th*, 1909.

Met pursuant to adjournment.

Present: The Commissioner, Mr. DOTT, Mr. GANS.

It is hereby stipulated and agreed by and between the respective parties hereto that Stephen Dubois Fessenden, a witness of lawful age who was called by and on behalf of the United States, and duly sworn in the case of the United States *vs.* Edwin S. Holmes, Jr., in the Supreme Court of the District of Columbia during the month of June, 1906, would, if called in this proceeding, testify as he then testified, to-wit, as follows:

212 "STEPHEN DUBOIS FESSENDEN, a witness of lawful age, called by and on behalf of the United States, having been first duly sworn, is examined

By Mr. BAKER:

Q. What is your occupation?

A. At the present time I am special field agent of the Bureau of Statistics in the Department of Agriculture.

Q. How long have you been employed in the Department of Agriculture?

A. My connection with it began, I think, on the 23rd of December, 1902.

Q. In what position?

A. As Assistant Statistician and assistant chief of Bureau.

Q. What, if anything, was done in regard to secrecy or keeping secret these reports on this day?

A. In the first place, our doors were closed in the morning, the doors of those two rooms, Mr. Hyde's and mine, and signs put up on them that there was positively no admission by order of the Secretary; and we aimed to keep everybody out that had no immediate connection with the work. We brought in, if we thought it necessary, several ladies to assist in the computations. They came in before the doors were locked, and they stayed there until we issued the report; and we were all supposed, in a general way, to stay there until the report came out. As a matter of practice, in the early days we did not always really observe the rule thoroughly. Occasionally something would come up and one of us would be called to the door; we might step into the hall and speak to somebody who wanted to know something about an office affair. The ladies, I do not think, were allowed to go out at all; but it occasionally happened that Mr. Hyde or Mr. Holmes or even myself would come outside for a moment.

Q. When you say "allowed to go out," who made this order, if you know?

A. I do not know, personally, who made the order. I simply know that that was the general understanding. It was what was

told me when I first came there by Mr Hyde—first, perhaps, by Mr. Olmsted, who was my immediate predecessor and instructed me some for a week before I actually took hold; and it was the general official understanding in the office.

213 Q. What was the general official understanding in the office in regard to the secrecy of the whole matter of the crop report?

A. The general understanding was, as I understand it, that all the information that we obtained there in the office, no matter how trivial, in regard to our crop reports, was confidential, and was to be kept absolutely secret; that we were not to discuss the matter with anybody on the outside at all.

By Mr. WORTHINGTON:

Q. At what hour of the day in 1904 would the final estimate figure be given out to the press?

A. Of cotton? It was customary then to give out the cotton report at twelve o'clock at noon.

Q. I mean cotton?

A. Yes; twelve o'clock at noon.

214 Q. You used the expression that in early times there was not as much care used about keeping everybody out of these rooms where the final tabulation was made as in later times?

A. I think not quite, though——

Q. To what period do you refer as the "early times," Mr. Fessenden?

Q. I refer to the period extending from the time I took charge, in 1902, up to possibly six months, some months before the "cotton leak" was supposed to have happened. Later on there was a time when we tightened up a little bit before this exposure was made—this so-called exposure. I do not mean to say by that, Mr. Worthington, that it was customary very frequently for people to step in and out; but we did it occasionally if we had any particular business.

Q. Do you remember any occasion when Congressmen were there when the final tabulation was being made up?

A. Yes.

Q. Was the Secretary there, too?

A. I think so. On one occasion I think I remember his being there and some Congressmen.

Q. Can you fix the date of that approximately at all?

215 Q. I do not think I can, definitely. I should think it was a few months before the first of June, 1904.

Q. Was it when the cotton crop report was being made up?

A. It may have been only a few weeks before; I do not remember. Yes; the cotton crop report was being made up at the time.

Q. What month was that?

A. Well, when I think of it now, I should say perhaps it was back as far as the December report; but I really am not clear in my mind.

Q. It would have to be to be a cotton crop report?

A. Yes, it would; that is a fact."

It is stipulated, however, that he would testify that the testimony

so given was in accordance with his best recollection at that time, and is in accordance with his present recollection, but that he has no present recollection as to the presence of the Secretary of Agriculture on the occasion mentioned in the testimony, when as he previously testified the said Secretary was present with certain Congressmen.

216 It is further stipulated and agreed that said Stephen Dubois Fessenden would testify that on the occasion when the said Congressmen or Congressman were present, they were locked in the room until the report had been issued to the public, and were not permitted to depart therefrom.

Mr. GANS: I offer in evidence a paper headed, "May Cotton Schedule," (county correspondents' schedule), and a paper headed, "May Cotton Schedule," (Township correspondents' schedule), it being admitted that said papers are copies of the schedules referred to in the testimony of the witness Olmstead, they having been sent out to the classes of correspondents therein mentioned for the purpose of receiving their estimates.

The said schedules are marked exhibits 1 and 2 of this date, and are as follows:

EXHIBIT 1, FEB. 17, 1909.

(Township Correspondents' Schedule) (A. S.—878).

May Cotton Schedule.

217 To be mailed promptly May 25th, 1905, in the enclosed penalty envelope, which requires no postage.

(Report should be for your immediate locality.)

Name: ..... Post-office: .....

County: ..... State: .....

Please do not omit your name and address.
See instructions on other side.

Acreage of cotton compared with that planted last year. (See note on other side.)	Estimated condition of cotton May 25, 1905, as compared NOT with last year's condition, but with a normal condition of growth and vitality represented by 100. (See note on other side.)
Per cent.	Per cent.
.....	.....

(Reverse side.)

UNITED STATES DEPARTMENT OF AGRICULTURE,
BUREAU OF STATISTICS,
WASHINGTON, D. C., *May* 10, 1905.

Instructions to Correspondents.

Mail Schedules Promptly May 25.

This schedule should be mailed on the date indicated. Schedules received after May 31 can not be used. The inclosed envelope will require no postage.

218 Acreage of Cotton.

This is asked for in the form of a percentage as compared with the acreage planted last spring. An increase of one-tenth, or 10 per cent. should be reported 110, a decrease of 10 per cent, 90 etc.

Condition of Cotton.

The condition of cotton is called for in the form of a percentage as compared *not* with a condition at this time last year, but with a normal condition of growth and vitalit- such as would accompany favorable weather, immunity from insect pests, and other injurious agencies. The normal condition is not the average condition nor the highest possible condition, but one higher than the average and lower than the possible maximum; it is represented by 100 per cent. If the present condition is 10 per cent. above the normal, the answer should be 110; if 5 per cent. below, it should be recorded 95, etc.

Respectfully, JOHN HYDE,
Statistician and Chief of Bureau."

219 EXHIBIT 2, FEBRUARY 17TH, 1909.

(County Correspondents' Schedule) (A. S.—877).

May Cotton Schedule.

To be mailed promptly May 25, 1905, in the inclosed penalty envelope, which requires no postage.

(Report should be for your entire county.)

Name: ..... Post-office: .....

County: ..... State: .....

Please do not omit your name and address.
See instructions on other side.

Acreage of cotton compared with that planted last year. (See note on other side.)	Estimated condition of cotton May 25, 1905, as compared NOT with last year's condition, but with a normal condition of growth and vitality represented by 100. (See note on other side.)
Per cent.	Per cent.
.....	.....

(On reverse side appears the following:)

UNITED STATES DEPARTMENT OF AGRICULTURE,
BUREAU OF STATISTICS,
WASHINGTON, D. C., *May* 10, 1905.

Instructions to Correspondents.

220 Mail Schedules Promptly May 25.

This schedule should be mailed on the date indicated. Schedules received after May 31 can not be used. The inclosed envelope will require no postage.

Acreage of Cotton.

This is asked for in the form of a percentage as compared with the acreage planted last spring. An increase of one-tenth, or 10 per cent., should be reported 110, a decrease of 10 per cent., 90, etc.

Condition of Cotton.

The condition of cotton is called for in the form of a percentage as compared *not* with a condition at this time last year, but with a normal condition of growth and vitality such as would accompany favorable weather, immunity from insect pests, and other injurious agencies. The normal condition is not the average condition nor the highest possible condition, but one higher than the average and lower than the *possible* maximum; it is represented by 100 per cent. If the present condition is 10 per cent. above the normal, the answer should be 110; if 5 per cent. below, it should be recorded 95, etc.

Respectfully, JOHN HYDE,
Statistician and Chief of Bureau.

221 Mr. GANS: I offer in evidence similar schedules for May, 1904, and asked that they be marked as exhibits in the case.

Marked exhibits 3 and 4 respectively, of this date, and are as follows:

EXHIBIT 3, FEB. 17, 1909.

(County Correspondent.) (A. S.—790.)

Cotton Schedule.

To be mailed May 26, 1904.
(Report should be for your entire county.)

Name: ..... Post-office: .....

County: ..... State: .....

Please do not omit your name and address.
See instructions on other side.

Acreage of cotton compared with that planted last year. (See note on other side.)	Condition of cotton May 26. Normal growth and vitality are represented by 100. (See note on other side.)
Per cent.	Per cent.
.....	.....

222 (On reverse side appears the following:)

UNITED STATES DEPARTMENT OF AGRICULTURE,
BUREAU OF STATISTICS,
WASHINGTON, D. C., *May* 2, 1904.

Instructions to Correspondents.

Mail Schedules Promptly May 26.

This schedule should be mailed on the date indicated. Schedules received after May 31 can not be used. The inclosed envelope will require no postage.

Acreage of Cotton.

This is asked for in the form of a percentage as compared with the acreage planted last spring. An increase of one-tenth, or 10 per cent., should be shown as 110, a decrease of 10 per cent. as 90, etc.

Average Condition of Cotton.

The condition should be shown in the form of a percentage as compared with the normal, 100 per cent. representing the normal. The normal does not mean the average condition, but such as would accompany favorable weather conditions and complete immunity from insect pests and other injurious agencies. At the same time, it does not represent the highest possible condition, but one higher than the average.

223 (On reverse side appears the following:)

UNITED STATES DEPARTMENT OF AGRICULTURE,
BUREAU OF STATISTICS,
WASHINGTON, D. C., *May* 2, 1904.

Instructions to Correspondents.

Mail Schedules Promptly May 26.

This schedule should be mailed on the date indicated. Schedules received after May 31 can not be used. The inclosed envelope will require no postage.

Acreage of Cotton.

This is asked for in the form of a percentage as compared with the acreage planted last spring. An increase of one-tenth, or 10 per cent., should be shown as 110, a decrease of 10 per cent as 90, etc.

Average Condition of Cotton.

The condition should be shown in the form of a percentage as compared with the normal, 100 per cent. representing the normal. The normal does not mean the average condition, but such as would accompany favorable weather conditions and complete immunity from insect pests and other injurious agencies. At the same time,

it does not represent the highest possible condition, but one
224 higher than the average and something below the possible maximum.

Respectfully, JOHN HYDE,
Statistician and Chief of Bureau.

EXHIBIT 4, FEB. 17, 1909.

(Township Correspondent.) (A. S.—795.)

Cotton Schedule.

To be mailed May 26, 1904.
(Report should be for your immediate locality.)

Name: ..... Post-office: .....

County: ..... State: ....

Please do not omit your name and address.
See instructions on other side.

Acreage of cotton compared with that planted last year. (See note on other side.)	Condition of cotton May 26. Normal growth and vitality are represented by 100. (See note on other side.)
Per cent.	Per cent.
.....	.....

225 (On reverse side appears the following:)

UNITED STATES DEPARTMENT OF AGRICULTURE,
BUREAU OF STATISTICS,
WASHINGTON, D. C., *May* 2, 1904.

Instructions to Correspondents.

Mail Schedules Promptly May 26.

This schedule should be mailed on the date indicated. Schedules received after May 31 can not be used. The inclosed envelope will require no postage.

Acreage of Cotton.

This is asked in the form of a percentage as compared with the acreage planted last spring. An increase of one-tenth, or 10 per cent., should be shown as 110, a decrease as 90, etc.

Average Condition of Cotton.

The condition should be shown in the form of a percentage as compared with the normal, 100 per cent representing the normal. The normal does not mean the average condition, but such as would accompany favorable weather conditions and complete immunity from insect pests and other injurious agencies. At the same time,

it does not represent the highest possible condition, but one
226 higher than the average and something below the possible maximum.

Respectfully, JOHN HYDE,
Statistician and Chief of Bureau.

Mr. GANS: I wish to further offer in evidence the official report on the cotton crop, issued June 2d, 1905, it being stipulated and agreed that the copy of said report which is offered may be received with the same force and effect as though the original was produced.

Mr. DORR: No objection.

Marked exhibit 5 of this date, and is as follows:

EXHIBIT 5, FEB. 17, 1909.

Copy.

UNITED STATES DEPARTMENT OF AGRICULTURE,
BUREAU OF STATISTICS,
WASHINGTON, D. C., *June* 2, 1905—12 noon.

Returns to the Chief of the Bureau of Statistics of the
227 Department of Agriculture show the total area planted in cotton in the United States up to May 25 to be about 28,120,000 acres, a decrease of about 3,510,000 acres, or 11.1 per cent., from the total acreage planted last year.

The average condition of the growing crop on May 25 was 77.2, as compared with 83 on May 26, 1904, 74.1 at the corresponding date in 1903, and a ten year average of 85.3.

The percentage of decrease in acreage in the different States (the comparison being with the total area planted last season) is as follows:

Virginia	13	Louisiana	14
North Carolina	10	Texas	12
South Carolina	11	Arkansas	15
Georgia	11	Tennessee	10
Florida	10	Missouri	14
Alabama	8	Oklahoma	11
Mississippi	12	Indian Territory	10

The condition of the crop by States on May 25 was as follows:

Virginia	87	Louisiana	73
North Carolina	83	Texas	69
South Carolina	78	Arkansas	73
Georgia	84	Tennessee	86
228 Florida	88	Missouri	84
Alabama	87	Oklahoma	88
Mississippi	73	Indian Territory	84

(Signed) JOHN HYDE,
Chief of Bureau.

Approved:
(Signed) JAMES WILSON, *Secretary.*

Mr. GANS: I move to strike out so much of the testimony of the witness Olmstead as defines the period to which acreage estimated as planted in the reports of the various correspondents was supposed to refer, on the ground that the testimony was incompetent, in view of the fact that it now appears that that which the various classes of correspondents were to report was reduced to writing, and appeared in printed form in the schedules upon which they were to report, and that any testimony on the part of a witness as to his construction of those instructions or as to a state of facts in contradiction with those instructions is incompetent and immaterial. In
229 support of this motion I say that at the time the witness testified it did not appear that the instructions to correspondents upon this point had been reduced to writing, and that now it does so appear, it for the first time becomes apparent that this evidence *in* inadmissible.

Mr. DORR: I object to that; I think that testimony explains these schedules.

The COMMISSIONER: Decision reserved.

Mr. GANS: We rest our case, except we shall reserve the privilege of correcting some of the testimony.

Mr. DORR: I request an adjournment until two o'clock tomorrow afternoon.

The COMMISSIONER: Adjournment granted.

Adjourned to Thursday, February 18th, 1909, at 2 00 P. M.

230 UNITED STATES

v.

THEODORE H. PRICE.

NEW YORK, *February 18th*, 1909.

Met pursuant to adjournment.

Present: The Commissioner, Mr. Dorr, Mr. Gans.

Mr. DORR: I want to offer in evidence a certified copy of the regulations of the Department of Agriculture, dated March 20th, 1907, and designated as General Order No. 2.

Marked exhibit 1 of this date, and is as follows:

EXHIBIT 1, FEB. 18, 1909.

MARCH 20, 1907.

It is hereby ordered that employees of the Department of
231 Agriculture shall under no circumstances give out in writing or otherwise, either for the information of any individual or for communication to the public, any statement whatever relating to the business of the Department without the written approval of the chief of the Bureau, Division, or office to which they may be assigned for duty, and by such approval the chief of any Bureau, Division, or Office shall assume all responsibility to the Secretary for the statement approved and for its publication.

(Signed) JAMES WILSON, *Secretary.*

Attest:

D. MacCUAIG,

Chief Clerk.

Mr. GANS: I object to the introduction of Exhibit 1 of this date simply on the ground that it is not a part of the rebuttal, but should have been a part of the direct evidence. In support of that objection I desire to point out when the witness Olmstead was on the stand, an offer was made to inquire in regard to these regulations and
232 his knowledge thereof, and the subject was excluded. If this matter had been introduced as a part of the direct case, then we would have had an opportunity to examine our witness in regard to it.

The COMMISSIONER: Are those the rules and regulations offered in the Peckham & Haas case?

Mr. DOBB: In the argument on the Haas demurrer in this district, these copies were before Judge Hough, and he thought it was proper to take judicial notice of the same. These are the only certified copies we have, and as they form a part of the docket of records in the Haas case in this district, I think they should be copied in the record here.

The COMMISSIONER: Objection overruled. Exception.

Mr. DOBB: I make the same offer in regard to paragraph 8 of the rules and regulations of Employees of the United States Department of Agriculture, dated December 19, 1901.

Mr. GANS: I make the same objection to the second offer, and that the rules should be offered as a whole, and not a single rule
233 selected from a number. I raise no question as to the authenticity of the papers, but the effect of these rules may be measured in court somewhat by the context the effect of a particular rule. It seems to me if one rule is going in it ought to be seen what class of rules and regulations there are, and that they ought to all go in.

The COMMISSIONER: Objection overruled. Exception.

Mr. DOBB: I offer paragraph 8 of the rules for Employees of the United States Department of Agriculture, dated December 19th, 1901.

Rules and regulations containing above paragraph marked exhibit 2 of this date.

Mr. GANS: I object on the grounds stated, and also on the ground that the entire set of rules ought to be offered, if any.

Mr. DOBB: It is conceded that there are also rules and regulations upon the same paper dealing among other things with the prohibition of smoking on the premises, owing to the inflammability of the premises; regulating the business of the employees; regulating the leave of absence and receiving of visitors by the employees,
234 and other matters of more equal or less importance.

Mr. GANS: On that concession I withdraw my objection based upon the fact that the entire paper is not offered, but I shall not withdraw my other objection, and will therefore take an exception to the Commissioner's ruling admitting them.

Exhibit 2, paragraph 8, is as follows:

EXHIBIT 2, FEB. 18, 1909.

8. No information in regard to transactions of an official character is to be communicated to anyone not connected with the public business.

Mr. DOBB: I offer a copy of the cotton crop report of the United States Department of Agriculture, Bureau of Statistics, for June, 1904.

Mr. GANS: I object on the ground that it is immaterial, incompetent and irrelevant, and not proper proof in this proceeding. I shall raise no objection to the authenticity of the paper, or its sufficiency to pr- the existence of such a report. The period to which it relates is prior to any period with which we are dealing, and the report itself is not the subject of any of the indictments, and forms no part of any of the allegations of conspiracy or alleged criminality of the indictments.

Mr. DOBB: I offer the report as bearing on the testimony of Olmstead on cross-examination and redirect, as to the period covered by the report on acreage, and also bearing on certain allegations in the indictment, and the sending of the telegram calling the attention of the public to the fact that the June, 1905, report giving the acreage only up to May 25th, 1905.

The COMMISSIONER: Decision reserved. It is understood that either party may have an exception.

Mr. DOBB: I move to strike out the testimony of the witness Samuel C. Hawkins and the exhibits which were introduced in connection with his testimony.

Mr. GANS: I object to that.

The COMMISSIONER: Decision reserved.

Mr. DOBB: The Government rests subject to the right to reopen the case at the next hearing if so advised.

Mr. GANS: The defendant moves for the dismissal of the proceedings on the grounds set forth at the close of the Government's direct case; and on the further ground that it now appears by affirmative proof that the nature of these reports was such that accuracy in the reports was impossible and that an agreement to render the report inaccurate in any particular was if entered into simply an agreement to do that which in any event was inevitable, and that upon the indictment and the affirmative proof it appears now that the agreement charged to have been entered into wasn't such as could involve any criminality. Also on the further ground that it now appears affirmatively that the disclosure of the contents of a report in advance wasn't in violation of any rule or regulation of the department, that on the contrary that the rules and regulations of the department affirmatively provide that under proper conditions matters of information on file in the department may be disclosed, and the evidence affirmatively proves that information upon file in the department was from time to time disclosed, with the sanction and consent of the head of the depart-

ment. On the further ground that it now appears affirmatively that the defendant is not the person charged in the indictment, and that there is no proof before the Commissioner to connect
237 him with the offenses alleged to have been committed by one Theodore H. Price in the indictment.

On the further ground that it now affirmatively appears that the defendant wasn't within the District of Columbia at any of the dates set forth in the indictment and that he didn't in the District of Columbia or elsewhere participate in any of the offenses cognizable by the courts of the District of Columbia.

On the further ground that it now affirmatively appears that if any offense was committed, it was committed within the Southern District of New York, and is triable only in the Southern District of New York.

On the further ground that it affirmatively appears that if any offense was committed it was committed at a period to which the statute of limitation applies, and for that reason is not an offense which may be prosecuted in the District of Columbia.

On the further ground that it now affirmatively appears that the defendant has been held to answer within the Southern District of New York for the same offense charged by the grand jury
238 in the Southern District of New York to have been committed within that district, and has given bail for his appearance within that district and therefore is now entitled to be tried for such offense in that district and in that district alone.

On the further ground that there is no evidence before the Commissioner sufficient to establish probable cause that the defendant has committed any crime in this jurisdiction.

I ask that each of these grounds for dismissal may apply to each one of the counts with the same force and effect as though I had stated them particularly in regard to the several counts enumerated, and that a ruling may be had with respect to each count, and that I may be given an exception with respect to the overruling of the motions in respect to each count.

The COMMISSIONER: The motion of defendant's counsel to dismiss is denied as to each ground on each count and an exception granted as to each.

Adjourned to Tuesday, February 23d, 1909, at 10.00 A. M.

239 EXHIBIT "B."

Complaint.

Before John A. Shields, Esq., United States Commissioner, Southern District of New York.

THE UNITED STATES
vs.
THEODORE H. PRICE.

R. S., Sec. 5440.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Goldthwaite H. Dorr, being first duly sworn, deposes and says:

That he is an Assistant United States Attorney for the Southern District of New York.

That he is informed and believes that on the 29th day of May, A. D., 1908, there were returned into the Supreme Court of the District of Columbia, by the Grand Jury of that body, two certain indictments, against Theodore H. Price, charging him with violating Section 5440 of the Revised Statutes of the United States as amended; that one of the said indictments was numbered 26088, and a copy of a duly certified copy thereof is hereto annexed, marked Exhibit A and made part hereof, and that the other of said indictments
240 was numbered 26089, and a copy of a duly certified copy thereof is hereto annexed, marked Exhibit B and made part hereof.

First Count.

On information and belief deponent says that heretofore, to wit, on the 31st day of May, A. D., 1905, and at the District of Columbia, and under the circumstances and conditions set forth and averred in the First Count of said Exhibit A, the said Theodore H. Price did unlawfully and knowingly conspire, combine, confederate and agree with one Edwin S. Holmes, Jr., and one Moses Haas, and divers other persons to the deponent unknown to defraud the United States of and concerning its governmental function in the matter of issuing and publishing the cotton crop report to be issued and published in the said Department and Bureau in the then next succeeding month of June, and of its right to administer an intelligent and honest service in that connection in the interests of the people of the United States, to be accomplished by the means and methods and under the circumstances and conditions in said First Count of Exhibit A set forth and described; and that in pursuance of said conspiracy and to effect the object thereof, the said Price, the said Haas and the said Holmes, at the places and at the times in said First Count set forth respectively did each do and perform the several acts averred and alleged in said First Count to have been done in pursuance
241 of and to effect the object of said conspiracy; against the peace of the United States, and their dignity and contrary to the

form of the statute of the United States in such case made and provided.

Second Count.

On information and belief deponent further says that on the 15th day of November, 1904, and at all times between that day and the 5th day of July, 1905, and on said last mentioned day, at the District of Columbia aforesaid and under the circumstances and conditions set forth and averred in the Second Count of said Exhibit A, the said Theodore H. Price did conspire together with the said Edwin S. Holmes, Jr., and said Moses Haas and divers other persons to this deponent unknown to defraud the United States in the dishonest and corrupt manner and through and by means of the dishonest and corrupt scheme and arrangement set forth in said Second Count; and that in pursuance of said last mentioned conspiracy and to effect its object, the said Price, Haas and Holmes, at the places and at the times set forth in said Second Count respectively did each do the several acts alleged in said Second Count to have been done in pursuance of and to effect the object of said conspiracy; against the peace of the United States and their dignity and contrary
242 to the form of the statute of the United States in such case made and provided.

Third Count.

On information and belief deponent further says that on the 31st day of May, 1905, and at the District of Columbia and under the circumstances and conditions set forth and averred in said Second Count of Exhibit A, the said Theodore H. Price unlawfully did conspire with the said Moses Haas and Edwin S. Holmes, Jr., and divers other persons to this deponent unknown to defraud the United States in the dishonest and corrupt manner and through and by means of the dishonest and corrupt scheme and arrangement set forth in said Third Count; and that in pursuance of said last mentioned conspiracy and to effect its object, the said Price, Haas and Holmes, at the places and times set forth in said Third Count respectively did each do and perform the several acts averred in said Third Count to have been done in pursuance of said conspiracy; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided.

243 *Fourth Count.*

On information and belief deponent further says that on the 31st day of May, 1905, and at the District of Columbia, and under the circumstances and conditions set forth in said Second Count of Exhibit A, the said Theodore H. Price unlawfully did conspire with the said Edwin S. Holmes, Jr., and said Moses Haas and divers other persons to deponent unknown to commit an offense against the United States, that is to say, the offense of misconduct on the part of the said Edwin S. Holmes, Jr., in his office of Associate Statistician in the Department of Agriculture to be done and committed

in the dishonest and corrupt manner and through and by means of the dishonest and corrupt scheme and arrangement set forth in the Fourth Count of said Exhibit A; and that in pursuance of said last mentioned conspiracy and to effect its object, the said Price, Haas and Holmes, at the places and at the times set forth in said Fourth Count respectively did each do and perform the several acts averred and alleged in said Fourth Count to have been done in pursuance of said last mentioned conspiracy; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided.

244 *Fifth Count.*

On information and belief deponent further says that on and before November 15, 1904, and continuously thereafter until and on July 5, 1905, and at the District of Columbia and under the circumstances and conditions in said Second Count set forth and averred, the said Theodore H. Price unlawfully did conspire with the said Edwin S. Holmes, Jr., and said Moses Haas and divers other persons to deponent unknown to defraud the United States in the dishonest and corrupt manner and through and by means of the dishonest and corrupt scheme and arrangement set forth in the Fifth Count of said Exhibit A; and that in pursuance of said last mentioned conspiracy and to effect its object, the said Price, Haas and Holmes, at the places and times in said Fifth Count set forth respectively did each do and perform the several acts averred in said Fifth Count to have been done in pursuance of said last mentioned conspiracy; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided.

Sixth Count.

On information and belief deponent further says that on and before November 15, 1904, and continuously thereafter until
245 and on July 5, 1905, and at the District of Columbia, and under the circumstances and conditions set forth in said Second Count of Exhibit A, the said Theodore H. Price unlawfully did conspire with the said Edwin S. Holmes, Jr., and the said Moses Haas and divers other persons to deponent unknown to commit an offence against the United States, that is to say, the offense of misconduct on the part of the said Edwin S. Holmes, Jr., in his said office of Associate Statistician in said Department of Agriculture to be done and committed in the dishonest and corrupt manner and through and by means of the dishonest and corrupt scheme and arrangement set forth in the Sixth Count of said Exhibit A; and that in pursuance of said last mentioned conspiracy and to effect its object, the said Price, Haas and Holmes, at the places and at the times set forth in said Sixth Count respectively did each do and perform the several acts averred and alleged in said Sixth Count, to have been done in pursuance of said last mentioned conspiracy; against the peace of the United States and their dignity and con-

trary to the form of the statute of the United States in such case made and provided.

Seventh Count.

On information and belief deponent further says that on May 31st, 1905, and at the District of Columbia and under the
246 circumstances and conditions in the Second Count of said Exhibit A set forth, the said Theodore H. Price did unlawfully conspire with the said Edwin S. Holmes, Jr., and Moses Haas and with divers other persons to deponent unknown to defraud the United States in the dishonest and corrupt manner and through and by means of the dishonest and corrupt scheme and arrangement set forth in the Seventh Count of said Exhibit A; and that in pursuance of said last mentioned conspiracy and to effect its object, the said Price, Haas and Holmes, at the places and times in said Seventh Count set forth, respectively did each do and perform the several acts averred in said Seventh Count to have been done in pursuance of said last mentioned conspiracy; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided.

Eighth Count.

On information and belief deponent further says that on May 31st, 1905, and at the District of Columbia, and under the circumstances and conditions in the Second Count of said Exhibit A set forth, the said Theodore H. Price unlawfully did conspire with the said Edwin S. Holmes, Jr., and said Moses Haas and with divers other persons to the deponent unknown to commit an offense
247 against the United States, that is to say, the offense of misconduct on the part of the said Edwin S. Holmes, Jr., in his said office of Associate Statistician [in said Department of Agriculture to be done and committed in the dishonest and corrupt manner and through and by means of the dishonest and corrupt scheme and arrangement set forth in the Eighth Count of said Exhibit A; and that in pursuance of said last mentioned conspiracy and to effect its object, the said Price, Haas and Holmes, at the places and times set forth in said Eighth Count respectively did each do and perform the several acts averred and alleged in said Eighth Count to have been done in pursuance of and to effect the object of said conspiracy; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided.

Ninth Count.

On information and belief deponent further says that heretofore, to wit, on the 31st day of May, 1905, and at the District of Columbia, and under the circumstances and conditions set forth in the First Count of said Exhibit B, the said Theodore H. Price unlawfully did conspire with Moses Haas to commit an offense against the United States, that is to say, the offense of promising, offer-
248 ing and giving to an officer of the United States and a person acting for and on behalf of the United States in an

official function under and by virtue of a certain department and office of the Government thereof, that is to say: to the said Edwin S. Holmes, Jr., Associate Statistician said Bureau of Statistics, a sum of money, the amount of which is to deponent unknown, to induce the said Holmes to do certain acts in violation of his lawful duty, that is to say, to induce the said Holmes to do the said acts set forth in said First Count of Exhibit B; and that in pursuance of said last mentioned conspiracy and to effect its object, the said Theodore H. Price and Moses Haas, at the places and times in said First Count of Exhibit B set forth respectively did each do and perform the several acts averred in said First Count to have been done in pursuance of said last mentioned conspiracy; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided.

Tenth Count.

On information and belief deponent further says that on May 31st, 1905, and at the District of Columbia, and under the circumstances and conditions in the First Count of Exhibit B set forth, said
249 Theodore H. Price unlawfully did conspire with Moses Haas to commit an offense against the United States, that is to say, the offense of promising, offering and giving to an officer of the United States and a person acting for and on behalf of the United States in an official function under and by virtue of a certain Department and office of the Government thereof, that is to say, to the said Edwin S. Holmes, Jr., Associate Statistician of said Bureau of Statistics, a sum of money the amount of which is to deponent unknown to induce the said Edwin S. Holmes, Jr., to do certain acts in violation of his lawful duty, that is to say, to induce the said Holmes unlawfully to do the several acts as set forth and averred in said Second Count of Exhibit B; and that in pursuance of said last mentioned conspiracy and to effect its object, the said Price and Haas at the places and times therein set forth respectively did each do and perform the several acts averred therein to have been done in pursuance of said last mentioned conspiracy; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided.

Deponent is informed and believes that on November 2, 1908, bench warrants were issued out of the Supreme Court, District of Columbia, for the apprehension of said Theodore H. Price under said indictments 26088 and 26089 outstanding in said court and
250 were on the same day returned not found.

Deponent is informed and believes that the said Theodore H. Price is now within the Southern District of New York.

The source of deponent's information and the grounds for his belief as to the matters herein stated to be alleged on information and belief are authenticated copies of the indictments and bench warrants referred to herein and official communications to him and investigations by him as to the matters herein alleged.

GOLDTHWAITE H. DORR.

Subscribed and sworn to before me this 30th day of November, 1908.

[SEAL.] JOHN A. SHIELDS,
U. S. Commissioner.

A Copy:
JOHN A. SHIELDS,
U. S. Commissioner.

251 EXHIBIT "C."

Indictment 26088.

EXHIBIT B.

Authentication.

Supreme Court of the District of Columbia.

I, John R. Young, Clerk of the said Court, do hereby certify that the following copy of indictment, annexed to this certificate, is a true copy of the original on file and of record in said office, and that said original indictment is pending in said Court.

Witness my hand and the seal of said Court, this 2d day of June, 1908.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk,*
By S. McC. HAWKEN,
Ass't Clerk.

I, Harry M. Clabaugh, Chief Justice of said Court, do certify the foregoing attestation by John R. Young, Clerk of the said Court, to be in due form.

Witness my hand and seal this 2d day of June, 1908.

HARRY M. CLABAUGH, [SEAL.]
Chief Justice.

I, John R. Young, Clerk of said Court, hereby certify that the Honorable Harry M. Clabaugh, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, Chief Justice of said Court, duly commissioned and qualified.

252 Witness my hand and the seal of said Court, this 2d day of June, 1908.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk.*
By S. Mc. HAWKEN,
Ass't Clerk.

253 (Endorsement:) No. 26088. United States *vs.* Theodore H. Price, Moses Haas and Frederick A. Peckham. Conspi-

racy to defraud the United States and to commit an offense against the United States. Witnesses: Andrew Parker, Sam'l Baulsir, Wm. L. Lanning, Nathaniel Murray, Louis C. Van Riper, Herbert H. Smith, Richard A. Springs, Victor Armistead, Russell Coats, Walter Mayer. A true bill. E. J. Walsh, Foreman. Filed in open court May 29, 1908. J. R. Young, Clerk.

254 EXHIBIT "C."

Indictment 26088.

Indictment Filed in Open Court, May 29, 1908; J. R. Young, Clerk.

In the Supreme Court of the District of Columbia, Holding a Criminal Term, April Term, A. D. 1908.

DISTRICT OF COLUMBIA, *ss:*

The Grand Jurors of the United States of America, in and for the District of Columbia aforesaid, upon their oath do present: That before and during the three years last past the United States, through the Department of Agriculture and a certain bureau of that department, to wit, the Bureau of Statistics, has exercised the governmental function of acquiring and diffusing among the people of the United States useful information on subjects connected with agriculture, including the subject of cotton; that in acquiring such information pertaining to cotton the United States, through the said Department and bureau, has made use of divers agencies, to wit: among others correspondence with cotton planters and dealers in and ginners of cotton, through employees and agents of the said department and Bureau located in the several States where cotton is grown, and through special investigations in the field by employees and agents of the said department and bureau; and that in diffusing the said information pertaining to cotton the United States has issued, on or near the third day of each of the months of June, July,
255 August, September, October and December in each year crop reports embracing statements, based upon the information so acquired, of the conditions of the cotton crop by States, in the United States, with such explanations, comparisons, and information as might be useful for illustrating that matter, which said cotton-crop reports have been by law required to be submitted to and officially approved by the Secretary of Agriculture before so being issued or published; and that under the practice, custom and regulation of the said department established and sanctioned by the said Secretary of Agriculture, no officer or employee thereof to whom such information might come by reason of his office or employment has been permitted to issue, publish or divulge to unauthorized persons, and all such officers and employees have been prohibited from issuing, publishing or divulging to unauthorized persons, any such information so acquired as aforesaid, or any such cotton-crop report, or any information indicating the probable contents or character of

the same, in advance of its official issuance and publication, or without its first being submitted to and officially approved by the said Secretary.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that Theodore H. Price, Moses Haas and Edwin S. Holmes, Junior, each late of the District of Columbia, on the thirty-first day of May, in the year of our Lord nineteen hundred
256 and five, at the said District of Columbia, unlawfully did knowingly conspire, combine, confederate and agree together, and with divers other persons to the said grand jurors unknown, to defraud the United States of and concerning its governmental function in the matter of issuing and publishing the cotton-crop report to be issued and published by the said department and bureau in the then next succeeding month of June, and of its rights to administer an intelligent and honest service in that behalf in the interests of the people of the United States, to be accomplished by the means and methods and under the circumstances and conditions now here set forth and described; that is to say:

That said Edwin S. Holmes, junior, before and on the day last aforesaid, was an officer and employee of the said department and bureau, to wit, Associate Statistician thereof; and a portion of the information upon which the said cotton-crop report was to be based, and which had been acquired by the said department and bureau in the manner aforesaid and indicated the probable contents and character of the said report, had come and was known to the said Edwin S. Holmes, junior, in his capacity as such officer and employee; and thereafter, and before the time of the official issuance and publication of the said report, other like information would come to and be known to the said Edwin S. Holmes, junior, in his said capacity.

The said Theodore H. Price and Moses Haas, who then
257 and there were neither officers nor employees either of the said department or of the said bureau, and who then and there were persons not in any manner authorized to have or know the information last aforesaid, or be informed as to the probable contents or character of the said crop report in advance of its official issuance and publication, or without such report first being submitted to and officially approved by the said Secretary, and who well knew all the premises in this indictment above set forth, were thereafter, and in advance of the said official issuance and publication of the said cotton-crop report, to obtain and receive from the said Edwin S. Holmes, junior, and the said Edwin S. Holmes, junior, also then well knowing the said premises, was to give and divulge to them, the said Theodore H. Price and Moses Haas, information which as aforesaid had and would come and be known to him, the said Edwin S. Holmes, junior, in his said capacity as an officer and employee of the said Department and bureau, and this without the said cotton-crop report being first submitted to and officially approved by the said Secretary of Agriculture; it being the design and intention of the said Theodore H. Price, Moses Haas and Edwin S. Holmes, junior, in so doing to make use of the said

information, before the lawful issuance and publication of the said report, for their pecuniary benefit, in speculating in cotton, in view of the probable effect upon the market price of that commodity which the subsequent lawful issuance and publication of the
258 said cotton crop report would have, and in other ways to the said grand jurors unknown.

Overt Acts.

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Theodore H. Price and Moses Haas afterwards, to wit, on the said thirty-first day of May, in the year of our Lord nineteen hundred and five, at the City of New York, and in the Southern District of New York, unlawfully did meet together to confer concerning the said unlawful conspiracy, combination, confederation and agreement.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Moses Haas afterwards, to wit, on the first day of June, in the year of our Lord nineteen hundred and five, unlawfully did journey from the said City of New York, in the said Southern District of New York, to the City of Washington, in the District of Columbia.

3. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful
259 conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Edwin S. Holmes, junior, afterwards, to wit, on the said first day of June, in the year of our Lord nineteen hundred and five, and at the District of Columbia aforesaid, unlawfully did give the information in this indictment above mentioned, pertaining to the cotton-crop report in this indictment above described, which had on and before that date been acquired by the said department and bureau in the manner hereinabove set forth, to the said Moses Haas for transmission by him to the said Theodore H. Price.

4. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Edwin S. Holmes, junior, afterwards, to wit, on the second day of June, in the year of our Lord nineteen hundred and five, and at the District of Columbia aforesaid, and before the official issuance and publication of the said cotton-crop report, unlawfully did give the information in this indictment above mentioned, pertaining to the cotton-crop report in this indictment above described, which had on and before that date been acquired by the said department and bureau in the manner hereinabove set forth, to the said Moses Haas for transmission by him to the said Theodore H. Price.

260 5. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Theodore H. Price afterwards, to wit, on the said second day of June, in the year of our Lord nineteen hundred and five, and before the official issuance and publication of the said cotton-crop report, at and within the said City and Southern District of New York, unlawfully did receive from the said Moses Haas the information last above mentioned.

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that the said Theodore H. Price, Moses Haas and Edwin S. Holmes, junior, at the time and place and in manner and form aforesaid, unlawfully did conspire together, and with others, to defraud the United States, and did each do acts to effect the object of the said conspiracy; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

261 *Second Count.*

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that in the administrative arrangement of the business of the Department of Agriculture of the said United States on and before the fifteenth day of November, in the year nineteen hundred and four, there was, and thence hitherto there has been, a bureau designated and known as the Bureau of Statistics; and that during the time and times aforesaid the said Bureau was under the management of an officer and employee of the said United States and of the said Department of Agriculture designated and known as statistician and as Chief of the Bureau of Statistics; and that during the time and times aforesaid there were in the said Bureau other officers and employees of the said United States and of the said Department of Agriculture, one of whom was designated and known as Associate Statistician and another of whom was designated and known as Assistant Statistician and as Assistant Chief of the Bureau of Statistics; and that during the time and times aforesaid whenever the said statistician was absent from his said office, the said Bureau was under the management of the said Associate Statistician who acted in the place and stead of said statistician as chief of said Bureau.

And that during the time and times aforesaid the said statistician with the aid and assistance of the said associate statistician
262 and of the other officers and employees of the said United States employed in said Bureau, and in the absence of the said statistician, the said associate statistician with the aid and assistance of the other officers and employees aforesaid of said Bureau, was charged with the duty of preparing during certain months in each year certain reports upon the condition of certain of the crops grown and raised in the United States, which reports became known as and were called crop reports, and that each of said crop reports was by law required to embrace statements of the condition of the crops therein mentioned by States of the said United States, with

such explanations, comparisons and information as might be useful for illustrating the matter contained in said reports, and that each of such reports was acquired by law to be submitted to and officially approved by the Secretary of Agriculture before being issued or published; that each of said reports was prepared by the said statistician or the said associate statistician in the manner aforesaid, from certain information collected by the said Bureau from divers sources approved by the said Bureau; amongst others being certain correspondents of the said Bureau of Statistics residing in those parts of the United States where were grown the particular crops upon which they furnished information, and who were persons having special knowledge upon the subject, and certain employees of the said Bureau, known as statistical agents, and certain other expert
263 employees of the said Bureau, whose duty it was to travel throughout the United States and ascertain the condition of the said crops; and that during the time and times aforesaid whenever the said statistician or the said associate statistician had as aforesaid prepared any of said reports, he, the said statistician, or the said associate statistician, as the case might be, in accordance with the requirement of law last aforesaid submitted the said report so prepared to the Secretary of Agriculture for the latter's official approval; and that whenever any of said reports was so submitted to said Secretary of Agriculture for his official approval, he, the said Secretary of Agriculture, in the usual course of business in his said department, and relying upon the proper performance of his duty in the preparation of said report by the said statistician or by the said associate statistician, as the case might be, officially approved the same; and that after such official approval by the said Secretary of Agriculture thereof, and not until such approval was given, each of said reports was issued and published by the said Department of Agriculture.

And that during the time and times aforesaid, the said crop reports were prepared, approved, and issued and published for the purpose of diffusing the information therein contained among the people of the United States, and that said crop reports were prepared at great expense to the said United States and were to be as
264 nearly fair, impartial, correct and accurate as it was possible for such reports to be; and the said crop reports and each of them upon their issuance and publication after being submitted to and officially approved by the Secretary of Agriculture as aforesaid did affect to a greater or less extent the market price of the several crops therein mentioned.

That during the time and times aforesaid a custom and practice prevailed in the said Department of Agriculture, established and sanctioned by the said Secretary, under which the giving out to the public of any information collected by the said Bureau of Statistics or its said officers or its said employees to be used in the preparation of, or to be contained therein, of any of said crop reports, was prohibited, and the keeping of such information secret was required, except such information as was contained in said crop reports when and after the said [illegible] had been officially issued and published.

And that during the time and times aforesaid it was the duty of the said statistician and of the said associate statistician and said other officials and employees aforesaid of the said Bureau of Statistics to prepare a true and accurate report upon each of said crops, from the information as to said crops obtained as aforesaid and without regard to the influence which any such reports might have upon the market price of the crop therein mentioned.

And that during the time and times aforesaid the said
265 statistician and associate statistician and the other officers and employees aforesaid of the said Bureau of Statistics were charged with the duty of honestly and carefully guarding and keeping secret and of not divulging to any person not employed in or connected with said Bureau of Statistics any information acquired by him or them in the course of preparing and assisting in preparing the said crop reports and in collecting statistics and compiling statistical matter for use in the preparation of said crop reports, or any of the matters and things and other information which might be contained in any of said crop reports, until said crop reports had been prepared, officially approved, and issued and published as aforesaid, and thereafter said duty of so maintaining secrecy as aforesaid continued save and except as to the matters and things so officially made public in said reports.

And that among the said crop reports so prepared by the said statistician with the aid and assistance of said associate statistician and said other officers and employees of the said Bureau of Statistics, and, in the absence of said statistician, so prepared by the said associate statistician with the aid and assistance of said other officers and employees of the said Bureau of Statistics as aforesaid, and so submitted to and officially approved by the said Secretary of Agriculture, and so issued and published by the Department of Agriculture, as aforesaid, was a report upon the cotton crop of the
266 United States, which was known as and called the cotton crop report, and which said cotton crop report during the time and times aforesaid was issued and published on or about the third day of each of the months of June, July, August, September, October and December in each year.

That on the sixteenth of November in the year nineteen hundred and three, and thence continuously until the ninth day of June in the year nineteen hundred and five, one Edwin S. Holmes, junior, held and occupied the office of, and was, such associate statistician in said Bureau of Statistics in the Department of Agriculture, and as such associate statistician the said Edwin S. Holmes, junior, was during the period last aforesaid charged with the duty of aiding and assisting the said statistician in the preparation of said crop reports including said cotton crop reports, and, in the absence of the said statistician the said Edwin S. Holmes, junior, as such associate statistician, was during the period last aforesaid charged with the duty of preparing with the aid and assistance of said other officers and employees of said Bureau as aforesaid all of the said crop reports including the said cotton crop reports as aforesaid, and that during the period last aforesaid, in the performance of his duties as said associate statistician in assisting the said statistician in the

preparation of said crop reports including said cotton crop
267 reports, and, in the absence of the said statistician, in the performance of his duties in preparing said crop reports, including the said cotton crop reports, he, the said Edwin S. Holmes, junior, did, before the official approval and issuance and publication of each of said crop reports, including the cotton crop reports, acquire and have knowledge of the statistics and statistical matter from which said crop reports, including said cotton crop reports, were prepared and of the matters and things and other information which were to be contained in each of said crop reports including said cotton crop reports.

And that during the period last aforesaid it was the duty of said Edwin S. Holmes, junior, as such associate statistician, whenever he prepared or assisted in preparing any of said reports to prepare and assist in preparing a true and accurate report from the information as to said crops obtained as aforesaid and without regard to the effect which such report might have upon the market price of the crop therein mentioned and honestly and carefully to guard and keep secret and not to divulge to any person not employed in or connected with said Bureau of Statistics any of the said statistics and statistical matter and information from which said crop reports including said cotton crop reports were to be prepared, and of the matters and things and other information which were to be contained in any of said crop reports, including said cotton crop
268 reports, knowledge of which was so as aforesaid acquired by him the said Edwin S. Holmes, junior, as such associate statistician, until the said reports has been prepared, officially approved and issued and published as aforesaid, and it was the duty of the said Edwin S. Holmes, junior, as said associate statistician, thereafter honestly and carefully to guard and keep secret and not to divulge to any person not employed in or connected with said Bureau any of the statistics and statistical matter and matters and things and other information last aforesaid, knowledge of which was so as aforesaid acquired by him, except such matters and things and other information as were included in and officially made public in said reports.

All and singular of which the premises and several premises in this count aforesaid, in so far as they were then existent, were known to the said Edwin S. Holmes, junior, and to a certain Theodore H. Price and to a certain Moses Haas, at the time of the commission by them of the offense hereinafter set forth.

That on the fifteenth day of November, in the year nineteen hundred and four, and continuously and at all times between said fifteenth day of November, nineteen hundred and four, and the fifth day of July, nineteen hundred and five, and on said last day aforesaid and at the District of Columbia, aforesaid, the said Edwin S. Holmes, junior, Theodore H. Price, and Moses Haas unlaw-
269 fully, corruptly and fraudulently did conspire, combine, confederate and agree together with certain other persons to the grand jurors aforesaid unknown, to defraud the United States in the dishonest and corrupt manner and through and by means of the

dishonest and corrupt scheme and arrangement following, that is to say: That in violation of the said duty of him, the said Edwin S. Holmes, junior, as such associate statistician honestly and carefully to keep secret all statistics and statistical matter and information, knowledge of which was acquired by him as aforesaid as such associate statistician, and in advance of the official issuance and publication of each of said cotton crop reports, as hereinbefore set forth, and in advance of the time or times when the matter and information contained in each of said cotton crop reports could lawfully be made public, and to prevent, obstruct and impair the due and orderly administration of the business and affairs of said Department of Agriculture, and to the prejudice of the said United States, he, the said Edwin S. Holmes, junior, should and would thereafter in so far as in him the power lay, furnish to the said Moses Haas and to the said Theodore H. Price the statistics and matter and information which were to be contained in each of said cotton crop reports, knowledge of which was as aforesaid, acquired by the said Edwin S. Holmes, junior, in the performance of his duty as such associate statistician.

270 *Overt Acts.*

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, and at the District of Columbia aforesaid, and on the twentieth day of November, nineteen hundred and four, and on divers other days between the said day last aforesaid and the third day of December in the same year, the said Edwin S. Holmes, junior, unlawfully and corruptly did communicate to the said Moses Haas statistics and matter and information which were to be contained in the said cotton crop report to be issued on the day last aforesaid, and which had been acquired by the said Edwin S. Holmes, junior, in the performance of his duties as such associate statistician.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Moses Haas on the day and days last aforesaid, and at the said City and Southern District of New York, unlawfully and corruptly did communicate to the said Theodore H. Price the information so furnished to him by the said Edwin S. Holmes, junior, as aforesaid.

3. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlaw-
271 ful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Theodore H. Price and Moses Haas afterwards, to wit, on the thirty-first day of May, in the year nineteen hundred and five, in the said City of New York, and in the said Southern District of New York, unlawfully did meet together to confer concerning the said unlawful conspiracy, combination, confederation and agreement.

4. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Moses Haas afterwards, to wit, on the first day of June, in the year nineteen hundred and five, unlawfully did journey from the said City of New York, in the said Southern District of New York, to the City of Washington, in the District of Columbia.

5. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Edwin S. Holmes, junior, afterwards, to wit, on the said first day of June, in the year nineteen hundred and five, and at the District of Columbia aforesaid, unlawfully and corruptly did communicate to the said Moses Haas information
272 which was to be contained in said cotton-crop report to be thereafter issued in said month of June, which information had been acquired by the said Edwin S. Holmes, junior, as aforesaid, in the performance of his official duty.

6. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Edwin S. Holmes, junior, afterwards, to wit, on the second day of June, in the year nineteen hundred and five, and at the District of Columbia aforesaid and before the official issuance and publication of the said cotton-crop report, last mentioned, unlawfully and corruptly did communicate to the said Moses Haas further information which was to be contained in said last mentioned cotton-crop report, and which had been acquired by the said Edwin S. Holmes, junior, in the performance of his said official duty.

7. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Theodore H. Price afterwards, to wit, on the said first and second days of June, in the year nineteen hundred and five, and before the official issuance and publication of the said cotton-crop report, at and within the said City and Southern District of New York, unlawfully did receive from the said
273 Moses Haas the information last above mentioned.

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that the said Theodore H. Price, Moses Haas and Edwin S. Holmes, junior, at the time and place and in manner and form in this count aforesaid, unlawfully did conspire together, and with others, to defraud the United States, and did each do acts to effect the object of the said conspiracy; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

Third Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the thirty-first day of May, nineteen hun-

dred and five, under the circumstances and conditions in the second count of this indictment set forth and averred pertaining to the organization and existence of the Bureau of Statistics in the Department of Agriculture, and pertaining to the employment of the said officers and employees of the said bureau and department in that count mentioned in their duties in regard to the preparation, issuance, publication and character of the crop reports therein mentioned, including the cotton-crop reports, and pertaining to the custom and practice which prevailed in said bureau with reference to the keeping secret of the information collected by said
274 bureau in the preparation of said crop reports, and information to be contained in said reports, and pertaining to the duty which was imposed upon said officers and employees of the said department and bureau therein mentioned of keeping secret and not divulging any of such information, and pertaining to the employment and duties as associate statistician of said Edwin S. Holmes, junior, as therein set forth, and which are now here again alleged to have existed on the day in this count mentioned, at the District of Columbia aforesaid, the said Edwin S. Holmes, junior, the said Moses Haas and the said Theodore H. Price unlawfully, corruptly and fraudulently did conspire, combine, confederate and agree together and with divers other persons to the grand jurors aforesaid unknown to defraud the United States in the dishonest and corrupt manner and through and by means of the dishonest and corrupt scheme and arrangement following, that is to say:

In violation of the duty of him, the said Edwin S. Holmes, junior, to prepare and assist in preparing the said cotton-crop reports truly and accurately from the information as to said crops obtained as aforesaid and without regard to the influence of such reports upon the market price of cotton, the said Edwin S. Holmes, junior, in assisting in preparing the said cotton-crop report to be issued in the month of June then next following, was to cause and procure the said report to be untrue and inaccurate by causing said report to state that there has been planted in cotton throughout the
275 United States a greater number of acres of land and that the condition of the cotton crop was better than would be shown by such report if it had been based upon the information as to said cotton crop obtained as aforesaid and had been truly and accurately prepared.

And in violation of the said duty of him, the said Edwin S. Holmes, junior, as such associate statistician honestly and carefully to keep secret all statistics and statistical matter and information, knowledge of which was acquired by him as associate statistician as aforesaid, and in advance of the official issue and publication of the said cotton-crop report to be published in the month of June then next following, and in advance of the time when the matters and information to be contained in said cotton-crop report could lawfully be made public, and to prevent, obstruct and impair the due and orderly administration of the business and affairs of said Department of Agriculture, and to the prejudice of the said United States, he, the said Edwin S. Holmes, junior, was, in so far as in him

the power lay, to furnish to the said Moses Haas and to the said Theodore H. Price the statistics and matter and information which were to be contained in said report, knowledge of which was as aforesaid acquired by the said Edwin S. Holmes, junior, in the performance of his duty as such associate statistician.

Overt Acts.

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Theodore H. Price and Moses Haas afterwards, to wit, on the said thirty-first day of May, in the year nineteen hundred and five, at the said City of New York, and in the Southern District of New York, unlawfully did meet together to confer concerning the said unlawful conspiracy, combination, confederation and agreement.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Moses Haas afterwards, to wit, on the first day of June, in the year nineteen hundred and five, unlawfully did journey from the said City of New York, in the said Southern District of New York, to the City of Washington, in the District of Columbia.

3. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Edwin S. Holmes, junior, afterwards, to wit, on the said first day of June, in the year nineteen hundred and five, and at the District of Columbia aforesaid, unlawfully did communicate to the said Moses Haas information which was
277 to be contained in said cotton crop report to be thereafter issued in said month of June which information had been acquired by said Holmes as aforesaid in the performance of his said official duty.

4. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, and at the District of Columbia aforesaid the said Edwin S. Holmes, junior, afterwards, to wit, on the second day of June in the year nineteen hundred and five, and before the official issuance and publication of the said last mentioned cotton crop report, unlawfully did communicate to the said Moses Haas further information which was to be contained in said cotton crop report and which had been acquired by the said Holmes in the performance of his said official duty.

5. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Theodore H. Price afterwards, to wit, on the said first and second days of June, in the year nineteen hun-

dred and five, and before the official issuance and publication of the said cotton-crop report, at and within the said City and Southern District of New York, unlawfully did receive from the said Moses Haas the information last above mentioned.

278 6. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Theodore H. Price afterwards, to wit, on the second day of June, in the year nineteen hundred and five, and after the said cotton-crop report had been issued in the said month of June, in the same year nineteen hundred and five, and at the said City and Southern District of New York, did prepare and send to the said Bureau of Statistics a telegram of the tenor following:

"NEW YORK, *June* 2, 1905.

John Hyde, Wash-n, D. C.:

Your report upon cotton acreage just issued reads as follows:

'The Bureau report shows a total area planted in cotton up to May 25th to be about 28,120,000 acres a decrease of about 3,610,000 acres or 11.4 per cent. from total acreage planted last year.

Will you kindly telegraph me at my expense immediately whether this means that 28,120,000 acres have actually been planted up to May 25th and that therefore any acreage planted after May 25th will be an increase upon the number of acres reported as planted in your report of today.

THEODORE H. PRICE."

7. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Edwin S. Holmes, junior, thereafter and on the said second day of June, in the year nineteen

279 hundred and five, at the City of Washington, District of Columbia, did cause to be prepared and sent to the said Theodore H. Price at the said City of New York a telegram of the tenor following:

"*Statistics.*

WASHINGTON, D. C., *June* 2, 1905.

Theodore H. Price, 82 Beaver St., N. Y.:

Report indicates about twenty-eight millions one hundred twenty thousand acres actually planted up to May 25.

HYDE."

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that the said Theodore H. Price, Moses Haas and Edwin S. Holmes, junior, at the time and place and in manner and form in this count of this indictment averred, unlawfully did conspire together, and with others, to defraud the United States, and did each do acts to effect the object of the said conspiracy; against the peace

and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

280 *Fourth Count.*

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the thirty-first day of May, nineteen hundred and five, under the circumstances and conditions in the second count of this indictment set forth and averred pertaining to the organization and existence of the Bureau of Statistics in the Department of Agriculture, and pertaining to the employment of the said officers and employees of the said bureau and department in that count mentioned and their duties in regard to the preparation, issuance, publication and character of the crop reports therein mentioned, including the cotton-crop reports, and pertaining to the custom and practice which prevailed in said Bureau with reference to the keeping secret of the information collected by said bureau in the preparation of said crop reports, and information to be contained in said reports, and pertaining to the duty which was imposed upon said officers and employees of the said department and bureau therein mentioned of keeping secret and not divulging any of such information, and pertaining to the employment and duties as associate statistician of said Edwin S. Holmes, junior, as therein set forth, and which are now here again alleged to have existed on the day in this count above mentioned, and at the District of Columbia aforesaid, the said Edwin S. Holmes, junior, the said Moses Haas and the said Theodore H. Price unlawfully, corruptly and
281 fraudulently did conspire, combine, confederate and agree together and with divers other persons to the grand jurors aforesaid unknown to commit an offense against the United States that is to say, the offense of misconduct on the part of him, the said Edwin S. Holmes, junior, in his said office of associate statistician in the said Department of Agriculture to be done and committed by him, the said Edwin S. Holmes, junior, in the dishonest and corrupt manner and through and by the means of the dishonest and corrupt scheme and arrangement following, that is to say:

In violation of the duty of him, the said Edwin S. Holmes, junior, to prepare and assist in preparing the said cotton-crop reports truly and accurately from the information as to said crops obtained as aforesaid and without regard to the influence of such reports upon the market price of cotton, the said Edwin S. Holmes, junior, in assisting in preparing the said cotton-crop report to be issued in the month of June then next following, was to cause and procure the said report to be untrue and inaccurate by causing said report to state that there had been planted in cotton throughout the United States a greater number of acres of land and that the condition of the cotton crop was better than would be shown by such report if it had been based upon the information as to said cotton crop obtained as aforesaid and had been truly and accurately prepared.

And in violation of the said duty of him, the said Edwin
282 S. Holmes, junior, as such associate statistician honestly and carefully to keep secret all statistics and statistical matter

and information, knowledge of which was acquired by him as associate statistician as aforesaid, and in advance of the official issue and publication of the said cotton-crop report to be published in the month of June then next following, and in advance of the time when the matters and information to be contained in said cotton-crop report could lawfully be made public, and to prevent, obstruct and impair the due and orderly administration of the business and affairs of said Department of Agriculture, and to the prejudice of the said United States he, the said Edwin S. Holmes, junior, was, in so far as in him the power lay, to furnish to the said Moses Haas and to the said Theodore H. Price the statistics and matter and information which were to be contained in said report, knowledge of which was as aforesaid acquired by the said Edwin S. Holmes, junior, in the performance of his duty as such associate statistician.

And the grand jurors aforesaid, upon their oath aforesaid do further present, that in pursuance of said last mentioned unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, and at the places and at the times in the third count hereof set forth, the said Theodore H. Price and the
283 said Moses Haas and the said Edwin S. Holmes, junior, respectively did each do and perform the several overt acts averred and alleged in said third count to have been done and performed by the said Theodore H. Price, the said Moses Haas and the said Edwin S. Holmes, junior, in pursuance of, and to effect the object of the conspiracy in said third count set forth and averred.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Theodore H. Price and the said Moses Haas and the said Edwin S. Holmes, junior, at the time and place and in the manner and form in this count aforesaid, unlawfully did conspire together and with others to commit an offense against the United States, and did each do acts to effect the object of said conspiracy; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

Fifth Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on and before the fifteenth day of November, nineteen hundred and four, and continuously and at all times between said last mentioned day and the fifth day of July in the year nineteen hundred and five, and on the said last mentioned day, and at the District of Columbia aforesaid, and under the circumstances and conditions in the second count of this indictment set forth and averred pertaining to the organization and existence of the
284 Bureau of Statistics in the Department of Agriculture, and pertaining to the employment of the said officers and employees of the said Bureau and department in that count mentioned and their duties in regard to the preparation issuance, publication and character of the crop reports therein mentioned, including the cotton-crop reports, and pertaining to the custom and practice which prevailed in said bureau with reference to the keeping secret of the information collected by said bureau in the preparation of said crop

reports, and information to be contained in said reports, pertaining to the duty which was imposed upon said officers and employees of the said department and bureau therein mentioned of keeping secret and not divulging any of such information and pertaining to the employment and duties as associate statistician of said Edwin S. Holmes, junior, as therein set forth, and which are now here again alleged to have existed on the days in this count mentioned, the said Edwin S. Holmes, junior, the said Moses Haas and the said Theodore H. Price unlawfully, corruptly and fraudulently did conspire, combine, confederate and agree together and with divers other persons to the grand jurors aforesaid unknown to defraud the United States in the dishonest and corrupt manner and through and by the means of the dishonest and corrupt scheme and arrangement following, that is to say:

In violation of the said duty of him, the said Edwin S.
285 Holmes, junior, as such associate statistician, honestly and carefully to guard and keep secret all statistics and statistical matter and information, knowledge of which was so as aforesaid acquired by him as such associate statistician, and in advance of the official issue and publication of each of said cotton-crop reports to be thereafter published by said department of Agriculture as hereinbefore set forth, and in advance of the time and times when the matters and things and other information contained in each of said cotton-crop reports could lawfully be made public, and to prevent, obstruct and impair the due and orderly administration of the business and affairs of said Department of Agriculture, and to the prejudice of the said United States, and to advance the pecuniary interests of them, the said Theodore H. Price, Moses Haas and Edwin S. Holmes, junior, he, the said Edwin S. Holmes, junior, should and would in so far as in him the power lay, furnish to the said Moses Haas and to the said Theodore H. Price the statistics and matter and information which were to be contained in each of said cotton crop reports, knowledge of which so as aforesaid was or would be acquired by him, the said Edwin S. Holmes, junior, in the performance of his duty as such associate statistician; and that whenever any such information should be so unlawfully furnished to the said Price, he, the said Price, would before the official issue and publication of the report containing such information engage
286 in buying or selling cotton, depending upon whether he, the said Price was of the opinion that said cotton-crop report when officially issued and published would cause the market price of cotton to increase or decrease; and that when and after said cotton crop report had been officially issued and published, the said Price would sell or buy cotton as the case might be, and would thereby make large gains and profits; and that such gains and profits would thereafter be divided among them, the said Theodore H. Price, Moses Haas and Edwin S. Holmes, junior, the manner and proportion of the division of which profits is to the grand jurors aforesaid unknown.

Overt Acts.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, and at the District of Columbia aforesaid, and on the twentieth day of November in the year nineteen hundred and four, and on divers and other days between the day last aforesaid and the third day of December in the same year, and before the official issuance and publication of the cotton-crop report which was issued by said Department on the day last aforesaid, the said Edwin
287 S. Holmes, junior, unlawfully and corruptly did communicate to the said Moses Haas statistics and matter and information which were to be contained in the said last mentioned cotton-crop report, and which had been acquired by the said Edwin S. Holmes, junior, in the performance of his duties as such associate statistician.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful conspiracy, combination, confederation and agreement, and to effect the object thereof, the said Moses Haas on the day and days in the last paragraph aforesaid, and at the City and Southern District of New York, unlawfully and corruptly did communicate to the said Theodore H. Price the information so furnished him by the said Edwin S. Holmes, junior, as aforesaid.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful conspiracy, combination, confederation and agreement, and to effect the object thereof, the said Theodore H. Price, at the City of New York, in the Southern District of New York, and on and before said third day of December last mentioned and before the official issuance and publication of said last mentioned report, and after he had received as aforesaid said information from the said Moses Haas as to the contents of said last mentioned report, unlawfully did sell large quantities of cotton.

288 And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the said third day of December in the year nine- hundred and four, the said last mentioned cotton crop report was officially issued and published by said Department, and that upon such publication the market price of cotton and as the result of the information contained in said report greatly decreased.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that in further pursuance of said unlawful conspiracy, combination, confederation and agreement, and to effect the object thereof, and at the said city and Southern District of New York, the said Theodore H. Price after said official issuance and publication of said report, did buy great quantities of cotton at such decreased price, and did thereby make large gains and profits, to wit, the sum of seven hundred and fifty thousand dollars.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that in further pursuance of said unlawful conspi-

racy, combination, confederation and agreement, and to effect the object thereof, and at the said City and Southern District of New York, the said Theodore Price, on the ninth day of December in said year nineteen hundred and four, unlawfully did give to the said Moses Haas the sum of one hundred and twenty-five thousand dollars of said gains and profits.

289 And the grand jurors aforesaid, upon their oath aforesaid, do further present that in further pursuance of said last mentioned unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, and at the places averred in the third count hereof, to wit, at the District of Columbia, and at the said City and Southern District of New York respectively, and on the day and days averred in said third count hereof, to wit, on the said thirty-first day of May and said first and second days of June, respectively, in said year of our Lord nineteen hundred and five, the said Theodore H. Price and the said Moses Haas and the said Edwin S. Holmes, junior, respectively did each do and perform the several overt acts averred and alleged in the third count of this indictment to have been done and performed by the said Theodore H. Price, the said Moses Haas, and the said Edwin S. Holmes, junior, in pursuance of and to effect the object of the conspiracy in said third count set forth and averred.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Theodore H. Price and the said Moses Haas and the said Edwin S. Holmes, junior, at the time and place and in the manner and form in this count aforesaid, unlawfully did conspire together and with others to defraud the United States, and did each do acts to effect the object of said conspiracy; against the peace and dignity of the said United States, and contrary to the form of

290 the statute of the same in such case made and provided.

Sixth Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on and before the fifteenth day of November, in the year of our Lord one thousand nine hundred and four, and continuously and at all times between that day and the fifth day of July in the year nineteen hundred and five, and on said last mentioned day, and at the District of Columbia aforesaid, and under the circumstances and conditions in the second count of this indictment set forth and averred pertaining to the organization and existence of the Bureau of Statistics in the Department of Agriculture, and pertaining to the employment of said officers and employees of the said Bureau and Department in that count mentioned, and their duties in regard to the preparation, issuance, publication and character of the crop reports therein mentioned, including the cotton-crop reports, and pertaining to the custom and practice which prevailed in said Bureau with reference to the keeping secret of the information collected by said Bureau in the preparation of said crop reports, and information to be contained in said reports, and pertaining to the duty which was imposed upon said officers and employees of the said Department and Bureau therein mentioned of

keeping secret and not divulging any of such information,
291 and pertaining to the employment and duties as associate statistician of said Edwin S. Holmes, junior, as therein set forth, and all of which are now here again alleged to have existed on the days in this count mentioned, the said Edwin S. Holmes, junior, the said Moses Haas and the said Theodore H. Price, unlawfully, corruptly and fraudulently did conspire, combine, confederate and agree together and with divers other persons to the grand jurors aforesaid unknown, to commit an offense against the United States, that is to say, the offense of misconduct on the part of him, the said Edwin S. Holmes, junior, in his said office of associate statistician in the said Department of Agriculture, to be done and committed by him, the said Edwin S. Holmes, junior, in the dishonest and corrupt manner and through and by means of the dishonest and corrupt scheme and arrangement following, that is to say:

In violation of the said duty of him, the said Edwin S. Holmes, junior, as such associate statistician, honestly and carefully to guard and keep secret all statistics and statistical matter and information, knowledge of which was so as aforesaid acquired by him as such associate statistician, and in advance of the official issue and publication of each of said cotton crop reports to be thereafter published by said Department of Agriculture as hereinbefore set forth, and in advance of the time and times when the matters and things
292 and other information contained in each of said cotton crop reports could lawfully be made public, and to prevent, obstruct and impair the due and orderly administration of the business and affairs of said Department of Agriculture, and to the prejudice of the said United States, and to advance the pecuniary interests of them, the said Theodore H. Price, Moses Haas and Edwin S. Holmes, junior, he, the said Edwin S. Holmes, junior, should and would, in so far as in him the power lay, furnish to the said Moses Haas and to the said Theodore H. Price the statistics and matter and information which were to be contained in each of said cotton crop reports knowledge of which so as aforesaid was or would be acquired by him, the said Edwin S. Holmes, junior, in the performance of his duty as such associate statistician; and that whenever any such information should be so unlawfully furnished to the said Price, he, the said Price, would before the official issue and publication of the report containing such information engage in buying or selling cotton, depending upon whether he, the said Price, was of the opinion that said cotton crop report when officially issued and published would cause the market price of cotton to increase or decrease; and that when and after said cotton crop report had been officially issued and published, the said Price would sell or buy cotton as the case might be, and would thereby make large gains and profits; and that such gains and profits would thereafter
293 be divided among them, the said Theodore H. Price, Moses Haas and Edwin S. Holmes, junior, the manner and proportion of the division of which profits is to the Grand Jurors aforesaid unknown.

Overt Acts.

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, and at the District of Columbia aforesaid, and on the twentieth day of November in the year nineteen hundred and four, and on divers other days between the day last aforesaid and the third day of December in the same year, and before the official issuance and publication of the cotton crop report which was issued by said Department on the day last aforesaid, the said Edwin S. Holmes, junior, unlawfully and corruptly did communicate to the said Moses Haas statistics and matter and information which were to be contained in said last mentioned cotton crop report, and which had been acquired by the said Edwin S. Holmes, junior, in the performance of his duties as such associate statistician.

2. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful conspiracy, combination, confederation and agreement, and to
294 effect the object thereof, the said Moses Haas on the day and days in the last paragraph aforesaid, and at the City and Southern District of New York, unlawfully and corruptly did communicate to the said Theodore H. Price the information so furnished to him by the said Edwin S. Holmes, junior, as aforesaid.

3. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of said unlawful conspiracy, combination, confederation and agreement, and to effect the object thereof, the said Theodore H. Price, at the City of New York, in the Southern District of New York, and on and before said third day of December last mentioned and before the official issuance and publication of said last mentioned report, and after he had received as aforesaid said information from the said Moses Haas as to the contents of said last mentioned report, unlawfully did sell large quantities of cotton.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that on said third day of December in the year of our Lord one thousand nine hundred and four, the said last mentioned cotton crop report was officially issued and published by said Department, and that upon such publication the market price of cotton and as the result of the information contained in said report greatly decreased.

4. And the Grand Jurors aforesaid, upon their oath afore-
295 said, do further present, that in further pursuance of said unlawful conspiracy, combination, confederation and agreement, and to effect the object thereof, and at the said city and Southern District of New York, the said Theodore H. Price, after said official issuance and publication of said report, did buy great quantities of cotton at such decreased price, and did thereby make large gains and profits, to wit, the sum of seven hundred and fifty thousand dollars.

5. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that in further pursuance of said unlawful conspiracy, combination, confederation and agreement, and to effect the

object thereof, and at the said City and Southern District of New York, the said Theodore H. Price, on the ninth day of December in said year, nineteen hundred and four, unlawfully did give to the said Moses Haas the sum of one hundred and twenty-five thousand dollars of said gains and profits.

And the grand Jurors aforesaid, upon their oath aforesaid, do further present that in further pursuance of said last mentioned unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, and at the places averred in the third count hereof, to wit, at the said District of Columbia, and at the said city and Southern District of New York respectively, and on the day and days averred in said third count hereof, to wit, on the
296 said twenty-first day of May and said first and second days of June respectively, in said year of our Lord nineteen hundred and five, the said Theodore H. Price and the said Moses Haas and the said Edwin S. Holmes, junior, respectively did each do and perform the several overt acts averred and alleged in the third count of this indictment to have been done and performed by the said Theodore H. Price, the said Moses Haas, and the said Edwin S. Holmes, junior, in pursuance of and to effect the object of the conspiracy in said third count set forth and averred.

And so the Grand Jurors aforesaid, upon their oath aforesaid, do say that the said Theodore H. Price, and the said Moses Haas and the said Edwin S. Holmes, junior, at the time and place and in the manner and form in this count aforesaid, unlawfully did conspire together and with others to commit an offense against the United States, and did each do acts to effect the object of said conspiracy; against the peace and dignity of the said United States and contrary to the form and statute of the same in such case made and provided.

Seventh Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the thirty-first day of May, nineteen hundred and five, under the circumstances and conditions in the second count of this indictment set forth and averred pertaining to the organization and existence of the Bureau of Statistics in the Department
297 of Agriculture, and pertaining to the employment of the said officers and employees of the said Bureau and Department in that count mentioned and their duties in regard to the preparation, issuance, publication and character of the crop reports therein mentioned, including the cotton crop reports, and pertaining to the custom and practice which prevailed in the said Bureau with reference to the keeping secret of the information collected by said Bureau in the preparation of said crop reports, and information to be contained in said reports, and pertaining to the duty which was imposed upon said officers and employees of the said department and bureau therein mentioned of keeping secret and not divulging any of such information, and pertaining to the employment and duties as associate statistician of said Edwin S. Holmes, junior, as therein set forth, and all of which are now here again alleged to have existed on the day in this count above mentioned, at the District of

Columbia aforesaid, the said Edwin S. Holmes, junior, the said Moses Haas, and the said Theodore H. Price unlawfully, corruptly and fraudulently did conspire, combine, confederate and agree together and with divers other persons to the grand jurors aforesaid unknown to defraud the United States in the dishonest and corrupt manner and through and by the means of the dishonest and corrupt scheme and arrangement following, that is to say:

In violation of the duty of him, the said Edwin S. Holmes, junior, to prepare and assist in preparing the said cotton-crop re-
298 ports truly and accurately from the information as to said crops obtained as aforesaid and without regard to the influence of such reports upon the market price of cotton, the said Edwin S. Holmes, junior, in assisting in preparing the said cotton-crop report to be issued in the month of June then next following, was to cause and procure the said report to be untrue and inaccurate by causing said report to state that there had been planted in cotton throughout the United States a greater number of acres of land than would be shown by such report if it had been based upon the information as to said cotton crop obtained as aforesaid and had been truly and accurately prepared; and he, the said Edwin S. Holmes, junior, was to cause and procure the said last mentioned report to purport to show the number of acres of land which had been actually planted in cotton only up to the twenty-fifth day of the month of May preceding the issuance of such report; and as soon as the said report should be officially issued and published the said Theodore H. Price was to telegraph to the said Bureau of Statistics asking whether said report included only the number of acres actually planted up to the said twenty fifth day of May, or whether it included also the number of acres which it was estimated would be thereafter planted in cotton; and the said Edwin S. Holmes was to cause a reply to be sent to the said Theodore
299 H. Price that the report included only the number of acres actually planted up to the day last mentioned.

And in violation of the said duty of him, the said Edwin S. Holmes, junior, as such associate statistician honestly and carefully to keep secret all statistics and statistical matter and information, knowledge of which was acquired by him as associate statistician as aforesaid, and in advance of the official issue and publication of the said last mentioned cotton-crop report, and in advance of the time when the matters and information to be contained in said cotton-crop report could lawfully be made public, and to prevent, obstruct and impair the due and orderly administration of the business and affairs of said Department of Agriculture, and to the prejudice of the said United States, he, the said Edwin S. Holmes, junior, was, in so far as in him the power lay, to furnish to the said Moses Haas and to the said Theodore H. Price the statistics and matter and information which were to be contained in said report, knowledge of which was as aforesaid acquired by the said Edwin S. Holmes, junior, in the performance of his duty as such associate statistician

Overt Acts.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of said last mentioned unlawful conspiracy, combination, confederation and agreement, and
300 to effect the object of the same, and at the respective places averred in the third count hereof, to wit, at the said District of Columbia and at the said City and Southern District of New York, and on the day and respective days averred in the said third count hereof, to wit, on the said thirty-first day of May and on the said first and second days of June in said year of our Lord nineteen hundred and five, the said Theodore H. Price and the said Moses Haas and the said Edwin S. Holmes, junior, respectively did each do and perform the several overt acts averred and alleged in the third count of this indictment to have been done and performed by the said Theodore H. Price, the said Moses Haas, and the said Edwin S. Holmes, junior, in pursuance of and to effect the object of the conspiracy in said third count set forth and averred.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that in further pursuance of the said unlawful conspiracy, combination, confederation and agreement in this count averred, and to effect the object thereof, and at the District of Columbia, aforesaid, and on the second day of June in the year of our Lord nineteen hundred and five, the said Moses Haas did give to the said Edwin S. Holmes, junior, the sum of one thousand dollars.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that in further pursuance of said last men-
301 tioned unlawful conspiracy, combination, confederation and agreement, and to effect the object thereof, and at the said City and Southern District of New York, on the twenty-third day of May in the year of our Lord nineteen hundred and eight, the said Theodore H. Price unlawfully did promise to give to the said Moses Haas a large sum of money, the amount of which is to the grand jurors aforesaid unknown.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that in further pursuance of said last mentioned conspiracy, combination, confederation and agreement, and to effect the object thereof, and at the said City and Southern District of New York, and on the twenty-fifth day of May in the year last aforesaid, the said Theodore H. Price unlawfully did give to the said Moses Haas a large sum of money, the amount of which is to the grand jurors aforesaid unknown.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Theodore H. Price and the said Moses Haas and the said Edwin S. Holmes, junior, at the time and place and in the manner and form in this count aforesaid, unlawfully did conspire together and with others to defraud the United States, and did each do acts to effect the object of said conspiracy; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

302 *Eighth Count.*

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the thirty-first day of May, nineteen hundred and five, under the circumstances and conditions in the second count of this indictment set forth and averred pertaining to the organization and existence of the Bureau of Statistics in the Department of Agriculture, and pertaining to the employment of the said officers and employees of the said Bureau and Department in that count mentioned and their duties in regard to the preparation, issuance, publication and character of the crop reports therein mentioned, including the cotton crop reports, and pertaining to the custom and practice which prevailed in said Bureau with reference to the keeping secret of the information collected by said Bureau in the preparation of said crop reports, and information to be contained in said reports, and pertaining to the duty which was imposed upon said officers and employees of the said Department and Bureau therein mentioned of keeping secret and not divulging any of such information, and pertaining to the employment and duties as associate statistician of said Edwin S. Holmes, junior, as therein set forth, and all of which are now here again alleged to have existed on the day in this count above mentioned, and at the District
303 of Columbia aforesaid, the said Edwin S. Holmes, junior, the said Moses Haas and the said Theodore H. Price unlawfully, corruptly and fraudulently did conspire, combine, confederate and agree together and with divers other persons to the grand jurors unknown, to commit an offense against the United States, that is to say, the offense of misconduct on the part of him, the said Edwin S. Holmes, junior, in his said office of associate statistician in the said Department of Agriculture, to be done and committed by him, the said Edwin S. Holmes, junior, in the dishonest and corrupt manner and through and by means of the dishonest and corrupt scheme and arrangement following, that is to say:

In violation of the duty of him, the said Edwin S. Holmes, junior, to prepare and assist in preparing the said cotton crop reports truly and accurately from the information as to said crops obtained as aforesaid and without regard to the influence of such reports upon the market price of cotton, the said Edwin S. Holmes, junior, in assisting in preparing the said cotton crop report to be issued in the month of June then next following, was to cause and procure the said report to be untrue and inaccurate by causing said report to state that there had been planted in cotton throughout the United States a greater number of acres of land than would be shown by such report if it had been based upon the information as to said cotton crop obtained as aforesaid and had been truly and accurately
304 prepared; and he, the said Edwin S. Holmes, junior, was to cause and procure the said last mentioned report to purport to show the number of acres of land which had been actually planted in cotton only up to the twenty-fifth day of the month of May preceding the issuance of such report; and as soon as the said report should be officially issued and published the said Theodore H. Price was to telegraph to the said Bureau of Statistics asking whether said

report included only the number of acres actually planted up to said twenty-fifth day of May, or whether it included also the number of acres which it was estimated would be thereafter planted in cotton; and that the said Edwin S. Holmes, junior, was to cause a reply to be sent to the said Theodore H. Price that the report included only the number of acres actually planted up to the day last mentioned.

And in violation of the said duty of him, the said Edwin S. Holmes, junior, as such associate statistician, honestly and carefully to keep secret all statistics and statistical matter and information knowledge of which was acquired by him as associate statistician as aforesaid, and in advance of the official issue and publication of the said last mentioned cotton crop report, and in advance of the time when the matters and information to be contained in said cotton crop report could lawfully be made public, and to prevent, obstruct and impair the due and orderly administration of the busi-
305 ness and affairs of the said Department of Agriculture, and to the prejudice of the said United States, he, the said Edwin S. Holmes, junior, was in so far as in him the power lay, to furnish to the said Moses Haas and to the said Theodore H. Price the statistics and matter and information which were to be contained in said report, knowledge of which was as aforesaid acquired by the said Edwin S. Holmes, junior, in the performance of his duty as such associate statistician.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of said last mentioned unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, and at the respective places averred in the third count hereof, to wit, at the said District of Columbia, and at the said City and Southern District of New York, and on the day and respective days averred in said third count hereof, to wit, on the said thirty-first day of May, and on the said first and second days of June, in said year of our Lord nineteen hundred and five, the said Theodore H. Price and the said Moses Haas and the said Edwin S. Holmes, junior, respectively did each do and perform the several overt acts averred and alleged in the third count of this indictment to have been done and performed by the said Theodore H. Price, the said Moses Haas and the said Edwin S. Holmes, junior, in pur-
suance of and to effect the object of the conspiracy in said
306 third count set forth and averred.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that in further pursuance of the said unlawful conspiracy, combination confederation and agreement in this count averred, and to effect the object thereof, and at the District of Columbia aforesaid, and on the second day of June, in the year of Lord nineteen hundred and five, the said Moses Haas did give to the said Edwin S. Holmes, junior, the sum of one thousand dollars.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that in further pursuance of said last mentioned, unlawful conspiracy, combination, confederation and agreement, and to effect the object thereof, and at the said City and Southern District of New York, on the twenty-third day of May, in the year of our

Lord nineteen hundred and eight, the said Theodore H. Price unlawfully did promise to give to the said Moses Haas a large sum of money, the amount of which is to the grand jurors aforesaid unknown.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that in further pursuance of said last mentioned conspiracy, combination, confederation and agreement, and to effect the object thereof, and at the said city and Southern District of New York, and on the twenty-fifth day of May in the year
307 last aforesaid, the said Theodore H. Price unlawfully did give to the said Moses H. Haas a large sum of money, the amount of which is to the Grand Jurors aforesaid unknown.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Theodore H. Price and the said Moses Haas and the said Edwin S. Holmes, junior, at the time and place and in the manner and form in this count aforesaid unlawfully did conspire together, and with others, to commit an offense against the United States, and did each do acts to effect the object of said conspiracy; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

DANIEL W. BAKER,
Attorney of the United States in and
for the District of Columbia.

308 EXHIBIT "C."

Indictment.

Authentication.

Supreme Court of the District of Columbia.

I, John R. Young, Clerk of the said Court, do hereby certify that the following copy of indictment, annexed to this certificate, is a true copy of the original on file and of record in said office, and that said original indictment is pending in said Court.

Witness my hand and the seal of said Court, this 1st day of June, 1908.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk,*
By S. McC. HAWKEN,
Ass't Clerk.

I, Harry M. Clabaugh, Chief Justice of said Court, do certify the foregoing attestation by John R. Young, Clerk of the said Court, to be in due form.

Witness my hand and seal this 1st day of June, 1908.

HARRY M. CLABAUGH. [SEAL.]
Chief Justice.

I, John R. Young, Clerk of said Court, hereby certify that the Honorable Harry M. Clabaugh, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, Chief Justice of said Court, duly commissioned and qualified.

Witness my hand and the seal of said Court, this 1st day of June, 1908.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk*.
By S. McC. HAWKEN,
Ass't Clerk.

309 (Endorsement:) No. 26089. United States *vs.* Theodore H. Price and Moses Haas. Conspiracy to Commit Offense against the United States. Witnesses: Andrew Parker, Sam'l Raul-ir, Wm. L. Lanning, Nathaniel Murray, Louis C. Van Riper, Walter Mayer, Herbert R. Smith, Richard A. Springs, Victor Armistead, Russell R. Coats, Walter Mayer. A true bill. E. J. Walsh, Foreman. Filed in open court May 29, 1908. J. R. Young, Clerk.

310 Filed in Open Court May 29, 1908. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia, Holding a Criminal Term, April Term, A. D. 1908.

DISTRICT OF COLUMBIA, *ss.*:

The grand jurors of the United States of America, in and for the District of Columbia aforesaid, upon their oath, do present:

That in the administrative arrangement of the business of the Department of Agriculture of the said United States, on and before the thirty-first day of May, in the year nineteen hundred and five, there was, and from thence hitherto there has been, a bureau designated and known as the Bureau of Statistics; and that during the time and times aforesaid the said bureau was under the management of an officer and employee of the said United States and of the said Department of Agriculture designated and known as statistician and as chief of the Bureau of Statistics; and that during the time and times aforesaid there were in the said bureau other officers and employees of the said United States and of the said Department of Agriculture, one of whom was designated and known as associate statistician and another of whom was designated and known
311 as assistant statistician and as assistant chief of the Bureau of Statistics; and that during the time and times aforesaid whenever the said statistician was absent from his said office, the said bureau was under the management of the said associate statistician, who acted in the place and stead of said statistician as chief of said bureau.

And that during the time and times aforesaid the said statistician with the aid and assistance of the said associate statistician and of

the other officers and employees of the said United States employed in said bureau, and in the absence of the said statistician, the said associate statistician with the aid and assistance of the other officers and employees aforesaid of said bureau, was charged with the duty of preparing during certain months in each year certain reports upon the conditions of certain of the crops grown and raised in the United States, which reports became known as and were called crop reports, and that each of said crop reports was by law required to embrace statements of the conditions of the crops therein mentioned by States of the said United States, with such explanations, comparisons and information as might be useful for illustrating the matter contained in said reports, and that each of such reports was required by law to be submitted to and officially approved by the Secretary of Agriculture before being issued or published.

That each of said reports was prepared by the said statis-
312 tician or the said associate statistician in the manner aforesaid, from certain information collected by the said bureau from divers sources approved by the said bureau; amongst others being certain correspondents of the said Bureau of Statistics residing in those parts of the United States where were grown the particular crops upon which they furnished information, and who were persons having special knowledge upon the subject and certain employees of the said bureau, known as Statistical Agents, and certain other expert employees of the said bureau, whose duty it was to travel throughout the United States and ascertain the conditions of the said crops.

And that during the time and times aforesaid whenever the said statistician or the said associate statistician had as aforesaid prepared any of said reports, he, the said statistician, or the said associate statistician, as the case might be, in accordance with the requirement of law last aforesaid submitted the said report so prepared to the Secretary of Agriculture for the latter's official approval; and that whenever any of said reports was so submitted to said Secretary of Agriculture for his official approval, he, the said Secretary of Agriculture, in the usual course of business in his said department, and relying upon the proper performance of his duty in the preparation of said report by the said statistician or by the said associate statistician, as the case might be, officially approved the same; and
313 that after such official approval by the said Secretary of Agriculture thereof, and not until such approval was given, each of said reports was issued and published by the said Department of Agriculture.

And that during the time and times aforesaid, the said crop reports were prepared, approved, and issued and published for the purpose of diffusing the information therein contained among the people of the United States, and that said crop reports were prepared at great expense to the said United States and were to be fair, impartial, correct and accurate; and the said crop reports and each of them upon their issuance and publication after being submitted to and officially approved by the Secretary of Agriculture as aforesaid, did affect to a greater or less extent the market price of the several crops mentioned therein.

That during the time and times aforesaid a custom and practice prevailed in the said Department of Agriculture, established and sanctioned by the said Secretary, under which the giving out to the public of any information collected by the said Bureau of Statistics or its said officers or its said employees, to be used in the preparation of or to be contained in any of said crop reports, was prohibited, and the keeping of such information secret was required, except such information as was contained in said crop reports when and after the same had been officially issued and published. And that
311 during the time and times aforesaid it was the duty of the said statistician and of the said associate statistician and said other officials and employees aforesaid of the said Bureau of Statistics to prepare a true and accurate report upon each of the said crops, from the information as to said crops obtained as aforesaid, and without regard to the influence which any such report might have upon the market price of the crop therein mentioned.

And that during the time and times aforesaid the said statistician and the said associate statistician and the other officers and employees aforesaid of the said Bureau of Statistics were charged with the duty of honestly and carefully guarding and keeping secret and of not divulging to any person not employed in or connected with said Bureau of Statistics any information acquired by him or them in the course of preparing and assisting in preparing the said crop reports and in collecting statistics and compiling statistical matter for use in the preparation of said crop reports, or any of the matters and things and other information which might be contained in any of said crop reports, until said crop reports had been prepared, officially approved, and issued and published as aforesaid, and thereafter said duty of so maintaining secrecy as aforesaid continued save and except as to the matters and things so officially made public in said reports.

And that among the said crop reports so prepared by the said statistician with the aid and assistance of said associate sta-
315 tistician and said other officers and employees of the said Bureau of Statistics, and, in the absence of said statistician, so prepared by the said associate statistician with the aid and assistance of said other officers and employees of the said Bureau of Statistics as aforesaid, and so submitted to and officially approved by the said Secretary of Agriculture as aforesaid, was a report upon the cotton crop of the United States, which became known as and was called the cotton crop report, and which said cotton crop report during the time and times aforesaid was issued and published on or about the third day of *day of* the months of June, July, August, September, October and December in each year.

That on the sixteenth day of November, in the year nineteen hundred and three, and thence continuously until the ninth day of June, in the year nineteen hundred and five, one Edwin S. Holmes, Jr., held and occupied the office of, and was, such associate statistician in the said Bureau of Statistics in the Department of Agriculture, and as such was an officer of the United States and a person acting for and on behalf of the United States in an official function

under and by authority of the said department and bureau, and as such associate statistician the said Edwin S. Holmes, Jr., was during the period last aforesaid charged with the duty of aiding and assisting the said statistician in the preparation of said crop reports, including said cotton crop report, and, in the absence of the
316 said statistician from his office, the said Edwin S. Holmes, Jr., as such associate statistician, was during the period last aforesaid charged with the duty of preparing with the aid and assistance of said other officers and employees of said Bureau as aforesaid, all of the said crop reports, including the said cotton crop reports as aforesaid, and that during the period last aforesaid, in the performance of his duties as said associate statistician in assisting the said statistician in the preparation of said crop reports, including said cotton crop reports, and, in the absence of the said statistician in the performance of his duties in preparing said crop reports, including the said cotton crop reports, he, the said Edwin S. Holmes, Jr., did, before the official approval and issuance and publication of each of said crop reports, including the said cotton crop reports, acquire and have knowledge of the statistics and statistical matter from which said crop reports, including said cotton crop reports, were prepared, and of the matters and things and other information which were to be contained in each of said crop reports, including said cotton crop reports.

And that during the period last aforesaid it was the duty of said Edwin S. Holmes, Jr., as such associate statistician, whenever he prepared or assisted in preparing any of said reports, to prepare and assist in preparing a true and accurate report, from the information as to said crops obtained as aforesaid, and without regard to the effect
317 which such reports might have upon the market price of the crop therein mentioned, and honestly and carefully to guard and keep secret and not to divulge to any person not employed in or connected with said Bureau of Statistics any of the said statistics and statistical matter and information from which said crop reports, including said cotton crop reports, were to be prepared, and of the matters and things and other information which were to be contained in any of said crop reports, including said cotton crop reports, knowledge of which was so, as aforesaid, acquired by him, the said Edwin S. Holmes, Jr., as such associate statistician, until the said reports had been prepared, officially approved and issued and published as aforesaid, and it was the duty of the said Edwin S. Holmes, Jr., as such associate statistician, to thereafter honestly and carefully guard and keep secret and not divulge to any person not employed in or connected with said Bureau of Statistics any of the statistics and statistical matter and matters and things and other information last aforesaid, knowledge of which was so, as aforesaid, acquired by him, except such matters and things and other information as were included in and officially made public in said reports.

All and singular of which the premises and several premises aforesaid, in so far as they were then existent, were known to a certain Theodore H. Price and to a certain Moses Haas, at the time
318 of the commission by them of the offence hereinafter set forth.

That on the thirty-first day of May, in the year nineteen hundred and five, at the City of Washington, in the District of Columbia, one Moses Haas and one Theodore H. Price unlawfully did conspire, combine, confederate and agree together to commit an offense against the United States; that is to say, the offense of promising, offering and giving to an officer of the United States, and a person acting for and on behalf of the United States in an official function under and by virtue of a certain department and office of the government thereof; that is to say, to the said Edwin S. Holmes, Jr., associate statistician of the said Bureau of Statistics as aforesaid, a sum of money, the amount of which is to the grand jurors aforesaid unknown, to induce him the said Edwin S. Holmes, Jr., to do certain acts in violation of his lawful duty; that is to say, to induce him, the said Edwin S. Holmes, Jr., unlawfully and in violation of the said duty of him, the said Edwin S. Holmes, Jr., as such associate statistician, honestly and carefully to keep secret all statistics and statistical matter and information, knowledge of which was acquired by him as aforesaid as such associate statistician and in advance of the official issue and publication of the said cotton crop report, which was to be issued, as hereinbefore set forth, in the month of
319 June next ensuing, and in advance of the time when the matter and information contained in such cotton crop report could lawfully be made public, to furnish, in so far as in him the power lay, to the said Moses Haas and the said Theodore H. Price, the statistics, matter and information which were to be contained in said report, knowledge of which was, as aforesaid, acquired by said Edwin S. Holmes, Jr., in the performance of his duty as such associate statistician.

Overt Acts.

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Theodore H. Price and Moses Haas afterwards, to wit, on the thirty-first day of May, in the year nineteen hundred and five, at the said City of New York, and in the said Southern District of New York, unlawfully did meet together to confer concerning the said unlawful conspiracy, combination, confederation and agreement.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Moses Haas afterwards, to wit, on the first day of June, in the year nineteen hundred and five, un-
320 lawfully did journey from the said City of New York, in the said Southern District of New York, to the City of Washington, in the District of Columbia.

3. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, on the said first day of June, in the year

nineteen hundred and five, and at the city of Washington, in the District of Columbia aforesaid, the said Moses Haas unlawfully did promise and offer to give to the said Edwin S. Holmes, Jr., who was then, as aforesaid, an officer of the United States and a person acting for and on behalf of the United States in an official function under and by virtue of a certain department and office of the government thereof, a sum of money, the amount of which is to the grand jurors aforesaid unknown, to induce him, the said Edwin S. Holmes, Jr., in violation of the said duty of secrecy of him, the said Edwin S. Holmes, Jr., as hereinbefore set forth, and in advance of the official issue and publication of the said cotton crop report, which was to be issued in the said month of June, to furnish to him, the said Moses Haas, and to the said Theodore H. Price, the statistics, matter and information which were to be contained in the said last mentioned report.

4. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlaw-
321 ful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Moses Haas afterwards, to wit, on the said first day of June, in the year nineteen hundred and five, at the City of Washington, in the District of Columbia aforesaid, unlawfully did receive from the said Edwin S. Holmes, Jr., information which was to be contained in said cotton crop report, which was to be issued in said month of June, which information had been acquired by the said department and bureau in the manner hereinabove set forth.

5. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, at the city of Washington, in the District of Columbia aforesaid, on the second day of June, in the year nineteen hundred and five, and before the official issuance and publication of the said cotton crop report, the said Moses Haas unlawfully did receive from the said Edwin S. Holmes, Jr., further information which was to be contained in said cotton crop report which was to be issued in said month of June, and which information had been acquired by the said department and bureau in the manner hereinabove set forth.

6. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to
322 effect the object of the same, the said Theodore H. Price, on the said first and second days of June, in the year nineteen hundred and five, and before the official issuance and publication of the said cotton crop report, at and within the said City and Southern District of New York, unlawfully did receive from the said Moses Haas the information last above mentioned.

7. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Moses Haas, on the said Second day of June, in the year nineteen hundred and five, in the District of

Columbia aforesaid, unlawfully did give to the said Edwin S. Holmes, Jr., the sum of one thousand dollars.

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that the said Theodore H. Price and Moses Haas, at the time and place and in the manner and form aforesaid, unlawfully did conspire together, to commit an offense against the United States, and did each do acts to effect the object of the said conspiracy; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

323 *Second Count.*

And the grand jurors aforesaid, upon their oath aforesaid, do further present that on the thirty first day of May, nineteen hundred and five, under the circumstance and condition in the first count of this indictment set forth and averred, pertaining to the organization and existence of the Bureau of Statistics in the Department of Agriculture, and pertaining to the employment of the said officers and employees of the said bureau and department in the count mentioned, and their duties in regard to the preparation, issuance, publication and character of the crop reports therein mentioned, including the cotton crop reports, and pertaining to the custom and practice which prevailed in said bureau with reference to the keeping secret of the information collected by said bureau in the preparation of said crop reports, and information to be contained in said reports, and pertaining to the duty which was imposed upon said officers and employees of the said department and bureau therein mentioned of keeping secret and not divulging any of such information, and pertaining to the employment and duties as associate statistician of said Edwin S. Holmes, Jr., as therein set forth, and which are now here again alleged to have existed on the day in this count above mentioned, and while the said Edwin S. Holmes, Jr., was, as averred in said first count of this indictment, such officer of the United
324 States and a person acting for and on behalf of the United States in an official function under and by authority of the said department and bureau, and at the said District of Columbia, the said Moses Haas and the said Theodore H. Price unlawfully did conspire, combine, confederate and agree together to commit an offense against the United States, that is to say, the offense of promising, offering and giving to an officer of the United States and a person acting for and on behalf of the United States in an official function under and by virtue of a certain department and office of the government thereof; that is to say, to the said Edwin S. Holmes, Jr., associate statistician of the said Bureau of Statistics as aforesaid, a sum of money, the amount of which is to the grand jurors aforesaid unknown, to induce him, the said Edwin S. Holmes, Jr., to do certain acts in violation of his lawful duty; that is to say, to induce him, the said Edwin S. Holmes, Jr., in violation of the duty of him, the said Edwin S. Holmes, Jr., to prepare and assist in preparing the said cotton crop reports truly and accurately from the information as to said crops obtained as aforesaid, and without regard to the influence of such reports upon the market price of cotton,

unlawfully and corruptly, in assisting in preparing the said cotton-crop report which was to be issued in the month of June then next following, to cause and procure said last mentioned report to be untrue and inaccurate by causing such report to state that there had been planted in cotton throughout the United States a greater
325 number of acres of land, and that the condition of the said cotton crop was better than would be shown by such report if it had been based upon the information as to said cotton-crop obtained as aforesaid, and had been truly and accurately prepared; and further to induce him, the said Edwin S. Holmes, Jr., in violation of the said duty of him, the said Edwin S. Holmes, Jr., as such associate statistician honestly and carefully to keep secret all statistics and statistical matter and information, knowledge of which was acquired by him as associate statistician as aforesaid, and in advance of the official issue and publication of the said last mentioned report, and in advance of the time when the matters and information to be contained in said last mentioned cotton crop report could lawfully be made public, to furnish, in so far as in him the power lay, to the said Moses Haas and the said Theodore H. Price, the statistics, matter and information which were to be contained in the said last mentioned report, knowledge of which was, as aforesaid, acquired by the said Edwin S. Holmes, Jr., in the performance of his duty as such associate statistician.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that in pursuance of said last mentioned unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, and at the places and at the time in the first count hereof set forth, the said Theodore H. Price and the said Moses Haas each did do and perform the several overt acts
326 averred and alleged in the said first count to have been done and performed by the said Moses Haas and the said Theodore H. Price in pursuance of and to effect the object of the conspiracy in the said first count averred.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Moses Haas and the said Theodore H. Price at the time and place and in the manner and form in this count aforesaid, unlawfully did conspire together to commit an offense against the United States, and did each do acts to effect the object of said conspiracy; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

DANIEL W. BAKER,
Attorney of the United States in and
for the District of Columbia.

327 EXHIBIT "D."

Warrant.

The President of the United States of America to the marshal of the United States for the Southern District of New York, and to his deputies, or any or either of them:

Whereas, complaint on oath in writing hath been made to me charging that Theodore H. Price did at the District of Columbia, and on divers days in said complaint mentioned, conspire with divers persons in said complaint mentioned, to defraud the United States and to commit certain offences against the United States, in manner and form as is set forth in said complaint and exhibits thereto attached and made a part hereof, a copy of which complaint and exhibits is hereto attached and made a part hereof; against the peace of the United States and their dignity and against the form of the statute of the United States in such case made and provided; and it being satisfactorily proven to me that the said Theodore H. Price is now within the Southern District of New York

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said Theodore H. Price and bring his body forthwith before me, or some Judge or Justice of the United States, wherever in the State of New York he may be found, that he may then and there be dealt with according to law for the said offense.

328 Given under my hand and seal, this 30th day of November, in the year of our Lord one thousand nine hundred and eight.

[SEAL.] JOHN A. SHIELDS,
United States Commissioner for the Southern District of New York.

HENRY L. STIMSON,
United States Attorney.

329 Received this warrant on the 30th day of November, 1908, at New York City and executed the same by arresting the within named Theodore H. Price at New York City on the 30th day of November, 1908, and have his body now in court as within I am commanded.

WM. HENKEL,
U. S. Marshal.

The within named accused Theodore H. Price being arrested and brought before me on the within warrant and the charge herein contained being duly explained to said accused and he being duly cautioned and informed of his rights in the matter says that he demands an examination and the said accused Theodore H. Price is hereby committed to the custody of the U. S. Marshal for the Southern District of New York to be brought before me for examination on the

2d day of December, 1908, at 10.30 o'clock A. M. in default of $5000 bail.

New York, Nov. 30, 1908.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

To William Henkel, Esq., U. S. Marshal.

Defendant discharged on bail to await examination.
Nov. 30th, 1908.

JOHN A. SHIELDS,
U. S. Commissioner.

Attendance and examination adjourned to Dec. 10th, 1908, at 10:30 o'clock A. M.
Dec. 2, 1908.

JOHN A. SHIELDS,
U. S. Commissioner

Attendance and Examination adjourned to Dec. 19th, 10:30 A. M.
Dec. 10th, 1908.

JOHN A. SHIELDS,
U. S. Commissioner.

3330 Examination adjourned to Jan. 5, 1909, at 2 P. M.
Dec. 19, 1908.

ALEX. GILCHRIST,
U. S. Com'r.

Attendance and examination adjourned to January 6, 1909 at 2 o'clock P. M.
Jan. 5, 1909.

JOHN A. SHIELDS,
U. S. Comm'r.

Attendance and examination adjourned to January 7, 1909, at 2 o'clock P. M.
Jan. 6, 1909.

JOHN A. SHIELDS,
U. S. Comm'r.

Attendance and examination further adjourned to January 12th, 1909 at 2 o'clock P. M
January 7, 1909.

JOHN A. SHIELDS,
U. S. Comm'r.

Attendance and examination adjourned to January 19, 1909 at 2 o'clock P. M.
January 12, 1909.

JOHN A. SHIELDS,
U. S. Comm'r.

Attendance and examination adjourned to January 26, 1909 at 2 o'clock P. M.
January 19, 1909.

JOHN A. SHIELDS,
U. S. Comm'r.

Attendance and examination adjourned to February 2, 1909 at 2 o'clock P. M.
January 26, 1909.

JOHN A. SHIELDS,
U. S. Comm'r.

Attendance and examination adjourned to February 9, 1909 at 2 o'clock P. M.
February 2, 1909.

JOHN A. SHIELDS,
U. S. Comm'r.

Attendance and examination adjourned to February 11, 1909 at 10 o'clock A. M.
February 9, 1909.

JOHN A. SHIELDS,
U. S. Comm'r.

Attendance and examination adjourned to February 17,
331 1909 at 2 o'clock P. M.
February 11, 1909.

JOHN A. SHIELDS,
U. S. Commissioner.

Attendance and examination adjourned to February 18, 1909 at 2 o'clock P. M.
February 17, 1909.

JOHN A. SHIELDS,
U. S. Comm'r.

Attendance and examination adjourned to February 23, 1909 at 10 o'clock A. M.
February 18, 1909.

JOHN A. SHIELDS,
U. S. Commissioner.

Attendance and examination adjourned to February 24, 1909 at 10:30 o'clock A. M.
February 23, 1909.

JOHN A. SHIELDS,
U. S. Commissioner.

Attendance and examination adjourned to February 26, 1909 at 10:30 o'clock A. M.
February 24, 1909.

JOHN A. SHIELDS,
U. S. Commissioner.

Attendance and examination adjourned to await decision of Commissioner on motion to discharge deft.

February 26, 1909.

JOHN A. SHIELDS,
U. S. Commissioner.

332 COMMITMENT EXHIBIT "A."

The accused Theodore H. Price, named in the annexed warrant, having been arrested and brought before me on the said warrant, and the charges in the warrant and complaint contained having been duly explained to the said accused, and he being duly cautioned and informed of his rights in the matter, and having said that he demanded an examination, and said examination having been had, and it appearing to me from the testimony submitted that there is probable cause to believe the said Theodore H. Price guilty of the offences charged in the annexed warrant and the copy of the complaint annexed thereto and made a part thereof, except of the offences charged in counts Four, Six and Eight of said complaint which were withdrawn on said examination, he is hereby committed for trial at the District of Columbia, being the District in which the offences charged is alleged to have been committed. And the said Theodore H. Price is hereby committed to the custody of the United States Marshal for the Southern District of New York until a warrant for his removal shall issue by the U. S. District Judge or he shall be otherwise dealt with according to law.

Dated New York, March 1st, 1909.

JOHN A. SHIELDS. [SEAL.]
U. S. Commissioner, S. D. of N. Y.

To William Henkel, Esq., U. S. Marshal.

333 EXHIBIT "D."

Bench Warrant.

Ex. 3. J. A. S., U. S. Comm'r.

In the Supreme Court of the District of Columbia, Holding a Criminal Term.

Criminal No. 26089.

THE UNITED STATES
vs.
THEODORE H. PRICE.

Indicted for Conspiracy to Commit an Offense Against the U. S.

The President of the United States to the United States Marshal for the District of Columbia, Greeting.

You are hereby commanded to take the defendant Theodore H. Price if to be found in your District and him have before the Criminal

Court for the said District of Columbia immediately to answer the United States touching the offense charged against him.

Hereof fail not, and have there then this writ, so indorsed as to show how you have executed it.

Witness, the Honorable Harry M. Clabaugh, Chief Justice of said Court this 2nd day of November, A. D. 1908.

[SEAL.] J. R. YOUNG, *Clerk*.
By WM. F. LEMON,
Assistant Clerk.

(Endorsed:) Criminal Court No. 1.—Criminal No. 26089—United States *vs.* Theodore H. Price.—Bench Warrant.—Issued November 2nd, 1908.—Marshal's Return: Theodore H. Price not to be found. Nov. 5, 1908. Aulick Palmer, U. S. Marshal.

334 EXHIBIT "D11."

Bench Warrant.

Ex. 4. J. A. S., U. S. Comm'r.

In the Supreme Court of the District of Columbia, Holding a Criminal Term.

Criminal No. 26088.

THE UNITED STATES
vs.
THEODORE H. PRICE.

Indicted for Conspiracy to Defraud the U. S. and to Commit an Offense Against the U. S.

The President of the United States to the United States Marshal for the District of Columbia, Greeting:

You are hereby commanded to take the defendant Theodore H. Price if to be found in your District and him have before the Criminal Court for the said District of Columbia immediately to answer the United States touching the offense charged against him.

Hereof fail not, and have there then this writ, so indorsed as to show how you have executed it.

Witness, the Honorable Harry M. Clabaugh, Chief Justice of said Court, the 2nd day of November, A. D. 1908.

[SEAL.] J. R. YOUNG, *Clerk*.
By WM. F. LEMON,
Assistant Clerk.

(Endorsed:) Criminal Court No. 1—Criminal No. 26088—United States *vs.* Theodore H. Price.—Bench Warrant.—Issued November 2nd, 1908.—Marshal's Return: Theodore H. Price not to be found. Nov. 5, 1908. Aulick Palmer, U. S. Marshal.

335 *Authentication of Record.*

Supreme Court of the District of Columbia.

I, John R. Young, Clerk of the said Court, do hereby certify that the bench warrants annexed to this certificate are true copies of originals on file and of record in said court in said causes.

Witness my hand and the seal of said court, this 6th day of November, 1908.

[SEAL.]

J. R. YOUNG, *Clerk.*
By S. McC. HAWKEN,
Ass't Clerk.

I, Harry M. Clabaugh, Chief Justice of said court, do certify the foregoing attestation by John R. Young, Clerk of the said court, to be in due form.

Witness my hand and seal this 6th day of November, 1908.

HARRY M. CLABAUGH, [SEAL.]
Chief Justice.

I, John R. Young, Clerk of said court, hereby certify that the Honorable Harry M. Clabaugh, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, Chief Justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court, this 6th day of November, 1908.

[SEAL.]

J. R. YOUNG, *Clerk.*
By S. McC. HAWKEN,
Ass't Clerk.

336 EXHIBIT "E."

Affidavit of Theodore H. Price.

EXHIBIT 5. DECEMBER 2ND, 1908.

United States Circuit Court, Southern District of New York.

No. 308.

UNITED STATES OF AMERICA
vs.
THEODORE H. PRICE, Impleaded with MOSES HAAS and EDWIN S. HOLMES, JR.

Conspiracy to Defraud the United States. R. S., Sec. 5440.

No. 309.

UNITED STATES OF AMERICA
vs.
THEODORE H. PRICE, Impleaded with MOSES HAAS.

Conspiracy to Commit an Offence Against the United States. R. S., Sections 5440 and 5451.

SOUTHERN DISTRICT OF NEW YORK,
County of New York, ss:

Theodore H. Price, being duly sworn, says:

I am one of the defendants in the above entitled criminal causes, wherein I am by indictments found against me impleaded with the said Moses Haas and Edwin S. Holmes, Jr., charged with a conspiracy to defraud the United States and with a conspiracy to commit an offense against the United States, as will by said indictments more fully appear.

337 This affidavit is made for use in resisting a motion made by the United States Attorney for the Southern District of New York for the consent of the Circuit Court of the United States for the Southern District of New York, that the said United States Attorney for the Southern District of New York proceed with proceedings for my removal to the District of Columbia in accordance with the provisions of the Revised Statutes, Section 1014, said removal proceedings being based on two indictments filed against me and the said Moses Haas and Edwin S. Holmes, Jr., in the Supreme Court of the District of Columbia charging me and the said Moses Haas and Edwin S. Holmes, Jr., with the same identical alleged conspiracies which are charged against us in the indictments found against us as aforesaid in the above entitled criminal causes.

The indictments found in the above entitled criminal causes against me impleaded with the said Haas and Holmes were so found and filed on May 29, 1908, and on the same day the said indictments were found against me impleaded with the said Haas and Holmes by the Grand Jury for the District of Columbia.

Said indictments so found in the District of Columbia are in substance identical with those so found in the Southern District of New York except that in the former the offences charged,
338 namely, the alleged conspiracies are charged to have occurred in the District of Columbia, while in the latter they are charged to have occurred in the City of New York. Indeed, the said indictment to commit an offense against the United States so found in the District of Columbia is identical both in form and substance with that so found in the Southern District of New York except that in the former the *situs* of said alleged conspiracy is charged to have been in the District of Columbia, while in the latter it is charged to have been in the City of New York; and the first three counts of the indictment for conspiracy to defraud the United States so found in the District of Columbia is likewise identical both in form and substance with the indictment for said offense so found in the Southern District of New York except that in the former again the *situs* of the alleged conspiracy is charged to have been in the District of Columbia, while in the latter it is charged to have been in the City of New York. The remaining counts to said indictment for conspiracy to commit an offense so found in the District of Columbia obviously described the same identical alleged transactions as those charged in the first three counts thereof. All of the overt acts alleged in said indictments so far as they are therein alleged to have been committed by me are therein alleged to have been committed by me in the City of New York and not in the District of Columbia.

339 I am a cotton merchant and have been engaged in that business in the City of New York for upwards of twenty-five years and during all of that time I have resided and still reside in the City of New York in the Southern District of New York and I never resided or was engaged in business in the District of Columbia. During the period covered by the charges contained in said indictments, namely between the first day of November, 1904 (and indeed for a considerable period prior thereto) and the first day of August, 1905, I was not in the District of Columbia on any occasion, unless possibly while on a train passing through said district to some point further south, and to the best of my recollection, I was not in the District of Columbia at all during said period. There was certainly no occasion during said period on which I was within the District of Columbia and there had any communication directly or indirectly with the defendants Haas and Holmes, or either of them. A reference to said indictments against me in the District of Columbia will show that none of the overt acts which I am therein charged with having committed are alleged to have been committed by me in the District of Columbia.

Under the circumstances above stated, I submit that I am
340 entitled to be tried by a jury of the district of my residence, namely, of the Southern District of New York, wherein the charges preferred against me are in the said New York indictments alleged to have been committed, and in which every overt act charged against me, either in the New York indictments or in the District of Columbia indictments, is alleged to have been committed by me;

and under said circumstances I should not be subjected to trial in a distant district wherein I do not reside or before a jury of such district.

As hereinbefore alleged, my business is that of a cotton merchant in the City of New York. I am in sole charge of that business and have no partners therein. All the books of account of said business and the papers relating thereto for the period covered by the charges contained in these indictments are, as I am informed by my counsel and verily believe, material and necessary evidence in my behalf to disprove the acts charged against me in said indictments and all my employees concerned with said business during said period and who are still my employees and my only employees in said business are necessary and material witnesses on my behalf on the trial of this action to disprove the acts so charged against me without their evidence I cannot safely proceed to trial. A trial of these charges in the District of Columbia, which will unquestionably be pro-
341 tracted, as disclosed in the moving papers, will necessitate the continuous presence in the District of Columbia throughout the entire trial of all said books and papers and of myself and of all my said employees, and will necessitate a total suspension of my business during said period, involving me in great pecuniary loss, and will also subject me to the expense of maintaining myself and all of said witnesses in a distant district during all of said period. My said business is my sole means of livelihood and for me and all of my employees to be absent therefrom and leave such business without care or attention for what promises to be a period of at least three weeks would so disorganize and disrupt my said business that it would for all practical purposes utterly destroy it. Besides this, there are a large number of cotton merchants and brokers resident or doing business in the City of New York who are necessary and material witnesses for me on the trial of this action and without whose testimony I cannot safely proceed to the trial, and of these, as I am informed and believe, about thirty-seven were examined as witnesses by the New York Grand Jury which found these indictments against me, while as appears by endorsements on the District of Columbia indictments, only ten witnesses were there examined by the Grand Jury. The statement contained in the letter of the
342 Attorney General, attached to the moving papers herein, is not borne out by the list of witnesses endorsed on the indictments against me found in the District of Columbia, as there are only ten witnesses therein named. It will be necessary that I have all these witnesses in the District of Columbia during the entire trial and the cost of doing so will be enormous.

The suggestion contained in the moving papers that a speedy trial cannot be had in the Southern District of New York if the United States Attorney so desires it is, as I believe, unfounded. As I am informed and believe, and as is well known to this court, the United States Attorney in this district has practically absolute control of the order in which indictments found in this district are tried and he can prefer the trial of these indictments to the trial of others if he considers that the public interest so requires. Under these circumstances, there is no occasion for the purposes of a speedy trial of

depriving me of a trial before a jury of the district of my residence, and the district where I was born and raised and have spent almost my entire life, wherein every overt act charged against me, as well as the conspiracies themselves are alleged to have been committed or of subjecting me to the enormous burden and expense of a trial in the District of Columbia before an alien jury neces-sarily
343 constituted of men whom I have never known, and in a community in which I have never resided and where I am an utter stranger, and where my reputation for probity will count for nothing. And I beg further to submit that I should not be subjected to this enormous hardship and this overwhelming expense merely to serve the fancied convenience of this District Attorney and certain clerks in the Department of Agriculture.

THEODORE H. PRICE.

Sworn to before me this 12th day of October, 1908.

[SEAL.] HENRY A. SITTIG,
Notary Public, New York County.

344 Endorsed: Circuit Court of the United States, Southern District of New York. The United States of America against Theodore H. Price impleaded with Edwin S. Holmes, Jr. and Moses Haas. Conspiracy to defraud the U. S. The United States of America against Theodore H. Price impleaded with Moses Haas. Conspiracy to commit an offense against the United States. Affidavit of Theodore H. Price. Nicoll, Anable, Lindsay & Fuller, Attorneys for Defendant, 31 Nassau Street, New York.—U. S. Circuit Court, Southern District of N. Y., Filed Oct. 28, 1908, John A. Shields, Clerk.

345 EXHIBIT "F."

Affidavit of Henry L. Stimson.

EXHIBIT 6, DECEMBER 2ND, 1908.

United States Circuit Court, Southern District of New York.

No. 308.

UNITED STATES OF AMERICA
vs.
THEODORE H. PRICE, Impleaded with MOSES HAAS and EDWIN S. HOLMES, JR.

Conspiracy to Defraud the United States. R. S., Sec. 5440.

No. 309.

UNITED STATES OF AMERICA
vs.
THEODORE H. PRICE, Impleaded with MOSES HAAS.

Conspiracy to Commit an Offense Against the United States. R. S., Secs. 5440 and 5451.

SIRS: Please take notice that at a Stated Term of the United States Circuit Court in and for the Southern District of New York, to be

held at the United States Court and Post Office Building, Borough of Manhattan, City of New York, in said Southern District, on the 12th day of October at 11 A. M. or as soon thereafter as counsel can be heard, a motion will be made upon the annexed affidavit of Henry L. Stimson, United States Attorney for the Southern District of New York and upon all the pleadings, papers and proceedings in the above entitled causes, for the consent of the said Circuit Court, that
346 the United States Attorney for the Southern District of New York proceed with proceedings for the removal of the defendant Theodore H. Price to the District of Columbia in accordance with provisions of Revised Statutes, Section 1014.

Yours, etc.,

HENRY L. STIMSON,
United States Attorney for Southern District of New York, Attorney for United States.

Office & P. O. Address, Room 50, U. S. Court and P. O. Bldg., Borough of Manhattan, New York City.

To Messrs. Nicoll, Anable, Lindsay & Fuller, Attorneys for Defendant Theodore H. Price, 31 Nassau Street, New York City.

Dated, New York, October 6, 1908.

347 United States Circuit Court, Southern District of New York.

No. 308.

UNITED STATES OF AMERICA
vs.
THEODORE H. PRICE, Impleaded with MOSES HAAS and EDWIN S. HOLMES, JR.

Conspiracy to Defraud the United States. R. S., Sec. 5440.

No. 309.

UNITED STATES OF AMERICA
vs.
THEODORE H. PRICE, Impleaded with MOSES HAAS.

Conspiracy to Commit an Offense Against the United States. R. S., Secs. 5440 and 5451.

SOUTHERN DISTRICT OF NEW YORK,
County of New York, ss:

HENRY L. STIMSON, being duly sworn, says:

I am United States Attorney for the Southern District of New York.

The above entitled indictments against the defendant Theodore H. Price were presented to the Circuit Court of the United States for the Southern District of New York on May 29, 1908, and on that

day said defendant appeared in open court and entered a plea of not guilty to each of said indictments, with leave to withdraw
348 said plea and to demur to or move with respect to each of said indictments, and was admitted to bail. Thereafter on June 18, 1908, defendant Price withdrew said pleas of not guilty and moved to quash each of said indictments. Said motions came on for argument on June 18, 1908, and on October 1, 1908, an order was duly entered denying each of said motions and directing the defendant to appear to plead to each of said indictments on October 12, 1908.

I am informed by the United States Attorney for the District of Columbia that on May 29, 1908, two indictments were filed against the defendant Theodore H. Price in the Supreme Court of the District of Columbia, being indictments Nos. 26,088 and 26,089.

In indictment 26,088, the defendant Price is charged with conspiring with Edwin S. Holmes, Jr., and Moses Haas to defraud the United States in violation of provisions of R. S. Section 5440, the substance of the charge being that Edwin S. Holmes, Jr., in violation of his duty as associate statistician of the Bureau of Statistics of the Department of Agriculture was to reveal to his co-conspirators the prospective contents of the cotton crop report of June, 1905, in advance of its official publication and was to cause said
349 cotton crop report to be false and inaccurate in material particulars.

In indictment No. 26,089, defendant Price is charged with conspiring with Moses Haas, in violation of provisions of R. S. Sec. 5440, to commit an offense against the United States, the gist of the charge being that the defendants conspired to give a sum of money to Edwin S. Holmes, Jr., associate statistician of the Bureau of Statistics, Department of Agriculture, to induce him to reveal to them for their speculative purposes the prospective contents of the cotton crop report of June, 1905, in advance of its official publication and to induce him to render said report false and inaccurate in material particulars, all in violation of his lawful duty as said associate statistician. The defendant Edwin S. Holmes, Jr., I am informed, will be arraigned in Washington on indictment 26,088 during the ensuing week.

On June 3, 1908, I received from the District Attorney of the District of Columbia certified copies of said indictments, with a request that I institute proceedings for the removal of the defendants to the District of Columbia in accordance with the provisions of R. S. Sec. 1014.

On June 24, 1908, I filed a complaint before United States
350 Commissioner John A. Shields, against said defendant Price, praying for his removal to the District of Columbia, based on indictments Nos. 26,088 and 26,089, and Commissioner Shields on said date issued his warrant on said complaint. Said defendant Price has not been apprehended on said warrant, his counsel having agreed to produce him when wanted. Before proceeding further with these removal proceedings, which if successful before the Commissioner, would result in a request to a judge of the District Court

for a warrant for the removal of this defendant to the District of Columbia, I desire to secure the consent of the Circuit Court of this District to this course.

The indictments, both in this District and in the District of Columbia, which have been referred to above, relate to the so-called "cotton leak" matter. These particular indictments are based on transactions in May and June, 1905, but the ground to be covered in the trial in both instances covers transactions during a considerable period of time. For the cases to be disposed of with economy of the time of Courts, juries and of the Department of Justice, it is essential either that Holmes should be removed to this Dis-
351 trict for trial with the defendant Price, or that the defendant Price be removed to Washington for trial with the defendant Holmes on the conspiracy indictments to which they are co-defendants. The United States Attorney for the District of Columbia, and members of the Attorney General's staff resident in Washington have had charge of the investigation of this matter from its inception. Edwin S. Holmes, Jr., has already been tried once in the District of Columbia on an indictment growing out of the same general transaction, the trial resulting in a disagreement of the jury. This trial, I am informed, occupied three weeks.

The criminal business of this District is of such volume and the assignments of terms of Circuit Court for criminal work are such that it will probably be impracticable to bring these cases to trial in this district before October, 1909. I have received from the United States Attorney for the District of Columbia urgent requests for the prosecution of the removal proceedings. I am informed by him that if the other defendants are promptly removed to Washington, it would be his purpose to move for trial on the first of December indictments against Holmes, Haas and Peckham, and imme-
352 diately upon the conclusion of those cases, to move for trial the indictments against Price, Holmes and Haas. It is impracticable to try all of the cases together, because of the fact that Price and Peckham are not defendants under the same indictments.

It appears to be practicable to complete the trial of this defendant under the indictments pending in the District of Columbia before he could in any event be brought to trial in this District.

I am in receipt of a request from the Attorney General to be transmitted by me to this Court, that the Circuit Court in this District yield for the time its jurisdiction of the defendant Price to the Supreme Court of the District of Columbia. A copy of the same is hereto annexed.

HENRY L. STIMSON.

Sworn to before me this 6th day of October, 1908.

[SEAL.] FREDERICK K. CAMPBELL,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

353 Copy.

S. G. DEPARTMENT OF JUSTICE,
WASHINGTON, *October 5*, 1908.

Honorable Henry L. Stimson, United States Attorney, Southern District of New York, New York.

SIR: On May 29th, 1908, there were returned into the Circuit Court of your District certain indictments against Theodore H. Price, Moses Haas, and Frederick A. Peckham, together with Edwin S. Holmes, Jr., charging them with conspiracy to defraud the United States and to commit offenses against the United States. At the same time, similar indictments were returned against these men in the Supreme Court of the District of Columbia. Holmes is a resident of Washington, while Price, Haas and Peckham are at present in the State of New York.

You will be good enough to request the Circuit Court of your District to consent to the removal of Messrs. Price, Haas and Peckham to Washington, for trial upon the indictments pending here, it being understood of course that should the trial here result
354 in acquittal or conviction the indictments in New York will be dropped.

There are several reasons which lead me to make this request of the Circuit Court.

1. The indictments charge a conspiracy on the part of the several defendants to cause to be issued at Washington by the Bureau of Statistics for the Department of Agriculture of false cotton crop reports, and that Holmes, who was then Associate Statistician of the Bureau of Statistics, was to furnish to his co-conspirators in advance of their official issue the information to be contained in the reports. While, owing to the commission in your District of acts in pursuance of the conspiracy, the Court in your District has jurisdiction of the offense, yet the conspiracy was in all probability actually formed in Washington. The false reports were prepared and issued here and the advance information was given out here. The real *situs* of the crime then is the District of Columbia, and the trials should therefore be had here.

2. The defendant Holmes has been arrested and is now awaiting trial on the indictments pending in the District of Columbia. There are two series of these indictments, one against Price, Haas and Holmes, and the other against Haas, Peckham and Holmes.
355 It would be a great convenience and a vast saving to the Government to try the defendants together. Even this would necessitate two trials, one in each series. If the non-resident defendants are not removed to Washington, four trials would be needed, two in Washington and two in New York.

3. The great number of witnesses on the part of the Government to establish these cases are residents of Washington and for the most part officers and employees of the Department of Agriculture. The Secretary of Agriculture and the Assistant Secretary of Agriculture are essential witnesses on the part of the government. At the trial of Holmes, both the Secretary and the Assistant Secretary were on the stand several times, the Secretary himself being frequently recalled for further cross-examination. This could be easily done in

a trial in Washington; but should these officials be required to attend a trial in New York, not only would the work of the Agricultural Department be seriously hampered, but matters of state in which the Secretary's advice should be desired might be interfered with.

356 The Statistician and the Assistant Statistician and many other officials of the Bureau of Statistics are also necessary witnesses, while the Associate Statistician would be required, on account of his familiarity with the case, to be in constant attendance at the trial. The former trial of Holmes alone lasted about three weeks. It would not be possible to find any three weeks in the year during which the Bureau of Statistics would not issue, or be preparing to issue at least one crop report. Should the necessary witnesses in these cases be required to be in New York at the trial, it would be practically impossible to issue such a report.

Again, at the trial of these cases a great number of the original records of the Department of Agriculture will be required as evidence. Many of these records are in constant use in the Department. The inconvenience to which the Department would be put by the placing of these records in evidence in a trial in Washington would be very slight. It might be a very serious obstruction to the public business should it be necessary to take these records to New York.

Again, at the former trial of these cases it was a daily occurrence to call for additional records from the Department. This
357 would be difficult should the trial take place in New York.

Respectfully,

CHARLES J. BONAPARTE,
Attorney General.

(Endorsed:) U. S. Circuit Court, Southern District of New York.—United States *vs.* Theodore H. Price impleaded with Moses Haas and Edwin S. Holmes, Jr. United States *vs.* Theodore H. Price impleaded with Moses Haas.—Affidavit and Notice of Motion.—Henry L. Stimson, United States Attorney, Attorney for U. S.—Copy Received, Oct. 6, 1908. Nicoll, Anable, Lindsay & Fuller, Attorneys for Theodore H. Price.—No legal reason is perceived why every Court in which a man is indicted should not legally *attempt* to bring the accused to trial. If there are many of them, and they all try to get the defendant at the same time,—the ensuing confusion should be cleared away by the Court or Judge or other authority having the power of surrender. This Court has not jurisdiction under U. S. R. S. 1014—and has no objection, and (I think) can have no right to object, to the pursuit of such legal
358 remedies as the Courts or Prosecuting Officer of the District of Columbia may have under the section of the Rev. Stat. referred to. The conveniences of either prosecutor or defendant is not important—the District Columbia has a legal right to proceed in the way pointed out by statute, and to such procedure this Court assents. Motion granted. C. M. H. U. S. D. J. October 24, 1908. U. S. Circuit Court, Southern District N. Y.. Filed Oct. 26, 1908. John A. Shields, Clerk.

(Here follow Exhibits marked J, J1, K, K1, L, M, N, pages 359 to 365.)

Exhibit J

In the Supreme Court of the District of Columbia.

HOLDING A CRIMINAL TERM.

FILED IN OPEN COURT
MAY 29 1908
J. R. Young
Clerk

District of Columbia, } to wit: May Term, A. D. 1908

We, the Grand Jurors of the United States of America, in and for the District aforesaid, upon our oaths, do Present

at the District aforesaid, on the 31 day of May A. D. 1908

This presentment made on the evidence of

Adam Bauder
Henry Bauder
Wm L Fleming
Nathaniel Mundy
Jacob Vanderpool
Hezekiah Hewitt
Richard Spring
Victor Armstead
Russell Reed
Mack Mayes

J Walsh Foreman.

Exhibit J I

No. 26088

UNITED STATES

vs.

Theodore H Price
Moses Haas and
Frederick A Peckham

PRESENTMENT FOR

Conspiracy to defraud US

FILED IN OPEN COURT

MAY 29 1908

J. R. Young
Clerk

Exhibit "K"

In the Supreme Court of the District of Columbia.

HOLDING A CRIMINAL TERM.

District of Columbia, } to wit: May Term, A. D. 1908

We, the Grand Jurors of the United States of America, in and for the District aforesaid, upon our oaths, do Present

Theodore H. Price and
Moses Haas

at the District aforesaid, on the 31st day of May A. D. 1908

This presentment made on the evidence of

Adam Parker

Saml Bailey
Wm L Fanning
Nathaniel Murray
Louis C VanRipen
Herbert N Smith
Richard A Sparrow
Victor Demuteau
Lemuel R Coats
Nacia Mayer

E J Walsh

Foreman.

332

No. Orig

UN

The

N

PRES

Conspiracy

F

C

No. 26089

UNITED STATES

vs.

Theodore H. Price and
James Haas

INDICTMENT FOR

Conspiracy to Commit offense against the United States

FILED IN OPEN COURT

MAY 29 1908

J. R. Young
Clerk

No 26088

UNITED STATES

VS

Theodore H. Price
Moses Haas and
Frederick A. Peckham

. . . . . .

Conspiracy to Defraud the
United States and to
Commit and Offense against
. . The United States. . . .

Witnesses

FILED IN OPEN COURT

MAY 29 1908

J. R. Young
Clerk

Andrew Parker
Sam'l. Baulsir
Wm. L. Lanning,
Nathaniel Murray
Louis C. Van Riper
Herbert H. Smith
Richard A. Springs
Victor Armstead
Russell Coats
Walter Mayer

A true bill

E. J. Walsh
Foreman

Exhibit "M"

DISTRICT OF COLUMBIA.

1928

May 29th

jury was recessed until the meeting of the Court Monday next at 10 o'clock A M and they retire from the bar in custody of the bailiffs aforesaid

It is ordered that the Marshal pay the lawful fees and actual and necessary expenses incurred in travel of Ralph Van Gundy a witness on behalf of defendant Schneider as sworn to by said witness and certified to by the Clerk

The Grand jury comes into Court and presents indictments each endorsed thereon "A true bill"

Frederick C. Peckham and	"	" States.
Moses Haas	"	"
Moses Haas and	No 26087	" Conspiracy to commit an
Frederick C. Peckham	"	" offense against the United States
Theodore H. Rees,	No 26088	" Conspiracy to defraud the
Moses Haas and	"	" United States and to commit an
~~Frederick C. Peckham~~ Edward S. Holmes, Junior	"	" offense against the United States
Theodore H. Rees and	No 26089	" Conspiracy to commit an
Moses Haas	"	" offense against the United States

Upon motion of the Attorney of the United States, the Court awards bench warrants for the arrest of the defendants in each of the above cases

It is ordered that the Marshal pay the lawful fees of the U S Witnesses in attendance upon this Court today as certified to by the Clerk of Court and the Foreman of the Grand Jury respectively

The Court adjourns until Monday next at 10 o'clock A M

335

Exhibit "W"

46

Supreme Court o

NO.	PARTIES.
22 26088	UNITED STATES vs. 1 Theodore H 2. Moses Ha ~~3. Frederick A~~ 3. Edwin S. Holm

DATE.		
1908 May	29	Presentment a
" Oct.	12	Motion to qua supporting
" "	"	Motion to amen
" Nov.	2	Defts Nos. 1 + 2 awarded a
" "	5	Defts Nos 1 + 2 "Moses Haa "Theodore H.

District of Columbia—Crim

	CHARGE.	ATTORNEYS.	
	Conspiracy to defraud the U.S and to commit nd an offense ainst U.S. nior	For Prosecution— U. S. Attorney For Defendant—	At Mi Cl W

DINGS.	U. S. WITNESSES.
Indictment filed Mun. p. 32. ndictment and filed " ecord ch Warrants issued ch Warrants ret'd d to be found" and not to be found"	

366 Ex. S, 12/10 08.

In the Supreme Court of the District of Columbia.

Transcript of Record.

UNITED STATES OF AMERICA,
District of Columbia, ss:

To all to whom these presents come, Greeting:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, among others, were the following proceedings, to wit:

In the Supreme Court of the District of Columbia, Holding a Criminal Term. May Term A. D. 1908.

Filed in Open Court, May 29, 1908. J. R. Young, Clerk.

DISTRICT OF COLUMBIA, *To-wit:*

We, the Grand Jurors of the United States of America, in and for the District aforesaid, upon our oaths, do present Theodore H. Price, Moses Haas and Frederick A. Peckham at the District aforesaid, on the 31 day of May A. D. 1908.

367 This presentment made on the evidence of Andrew Parker, Saml. Baulsir, Wm. L. Lanning, Nathaniel Murray, Louis C. Van Riper, Herbert H. Smith, Richard A. Springs, Victor Armstead, Russell R. Coats, Walter Mayer.

E. J. WALSH, *Foreman.*

Endorsement: No. 26088. United States *vs.* Theodore H. Price, Moses Haas and Frederick A. Peckham. Presentment for Conspiracy to defraud U. S. Filed in Open Court May 29, 1908. J. R. Young, Clerk.

368 Endorsement: No. 26088. United States *vs.* Theodore H. Price, Moses Haas and Frederick A. Peckham. Conspiracy to Defraud the United States and to Commit an Offense against the United States. Witnesses: Andrew Parker, Sam'l Baulsir, Wm. L. Lanning, Nathaniel Murray, Louis C. Van Riper, Herbert H. Smith, Richard A. Springs, Victor Armstead, Russell Coats, Walter Mayer. A True Bill. E. J. Walsh, Foreman. Filed in Open Court May 29, 1908. J. R. Young, Clerk.

369 Supreme Court of the District of Columbia.

FRIDAY, *May* 29, 1908.

The court resumes its session pursuant to adjournment, Mr. Justice Stafford presiding.

* * * * * * *

The grand jury comes into court and presents indictments each endorsed thereon "A true bill" against

Edwin S. Holmes, junior,	No. 26086	For conspiracy to defraud the United States.
Frederick A. Peckham and	" "	
Moses Haas	" "	
Moses Haas and	No. 26087	For conspiracy to commit
Frederick A. Peckham	" "	an offense against the United States.
Theodore H. Price	No. 26088	For conspiracy to defraud
Moses Haas and	" "	the United States and
Edwin S. Holmes, junior	" "	to commit an offense
[Frederick A. Peckham]*		against the United States.
Theodore H. Price and	No. 26089	For conspiracy to commit
Moses Haas	" "	an offense against the United States.

Upon motion of the attorney of the United States the court awards bench warrants for the arrest of the defendants in each of the above cases.

* * * * * * *

[*Words enclosed in brackets erased in copy.]

No.	Parties	Charge	Attorneys.	Costs.
29088	United States *vs.* 1 Theodore H. Price 2 Moses Haas and [3 Frederick A. Peckham]* 3 Edwin S. Holmes, junior.	Conspiracy to defraud the U. S. and to commit an offense against U. S.	For prosecution— U. S. Attorney. For defendant—	Attorney..... Marshal..... Clerk..... Witnesses.....

Date.	Proceedings.	U. S. Witnesses.	Defendants' Witnesses.
1908.			
May 29	Presentment and indictment filed. M. 44, p. 330		
Oct. 12	Motion to quash indictment and supporting affi. filed.		
" "	Motion to amend record.		
Nov. 2	Defts Nos. 1 & 2 bench warrants awarded and issued.		
" 5	Defts Nos. 1 & 2 bench warrants ret'd "Moses Haas not to be found," and "Theodore H. Price not to be found."		

[*Figure and words enclosed in brackets erased in copy.]

371 *Authentication of Record.*

Supreme Court of the District of Columbia.

I, John R. Young, Clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said court in this cause.

Witness my hand and the seal of said court, this 7th day of December, 1908.

[SEAL.] JOHN R. YOUNG, *Clerk.*

I, Harry M. Clabaugh, Chief Justice of said court, do certify the foregoing attestation by John R. Young, Clerk of the said court, to be in due form.

Witness my hand and seal this 7th day of December, 1908.

HARRY M. CLABAUGH, [SEAL.]
Chief Justice.

I, John R. Young, Clerk of said court, hereby certify that the Honorable Harry M. Clabaugh, whose genuine signature is subscribed to the foregoing certificate was, at the time of signing and attesting the same, Chief Justice of said Court, duly commissioned and qualified.

Witness my hand and the seal of said court, this 7th day of December, 1908.

[SEAL.] JOHN R. YOUNG, *Clerk.*

372 EXHIBIT "I."

Ex. 9. 12 10 08.

In the Supreme Court of the District of Columbia.

Transcript of Record.

UNITED STATES OF AMERICA,
District of Columbia, ss:

To all to whom these presents come, Greeting:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, among others, were the following proceedings, to wit:

373 *Presentment.*

Filed in Open Court May 29, 1908. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia, Holding a Criminal Term. May Term, A. D. 1908.

DISTRICT OF COLUMBIA, *To wit:*

We, the Grand Jurors of the United States of America, in and for the District aforesaid, upon our oaths, do present Theodore H. Price and Moses Haas at the District aforesaid, on the 31st day of May A. D. 1908.

This presentment made on the evidence of Andrew Parker, Sam'l Baulsir, Wm. L. Lanning, Nathaniel Murray, Louis C. Van Riper, Herbert H. Smith, Richard A. Springs, Victor Armstead, Russell R. Coats, Walter Mayer.

E. J. WALSH, *Foreman.*

374 (Endorsed:) No. Orig. 26089. United States *vs.* Theodore H. Price and Moses Haas. Presentment for Conspiracy to Commit offense against the United States. Filed in open court, May 29, 1908. J. R. Young, Clerk.

375 *Authentication of Record.*

Supreme Court of the District of Columbia.

I, John R. Young, Clerk of the said court, do hereby certify that the writing annexed to this certificate is a true copy of original on file and of record in said court in this cause.

Witness my hand and the seal of said court, this 8th day of December, 1908.

[SEAL.] JOHN R. YOUNG, *Clerk.*

I, Harry M. Clabaugh, Chief Justice of said court, do certify the foregoing attestation of John R. Young, Clerk of the said court, to be in due form.

Witness my hand and seal this 8th day of December, 1908.

HARRY M. CLABAUGH. [SEAL.]
Chief Justice.

I, John R. Young, Clerk of said court, hereby certify that the Honorable Harry M. Clabaugh, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, Chief Justice of said court duly commissioned and qualified.

376 Witness my hand and the seal of said court, this 8th day of December, 1908.

[SEAL.] JOHN R. YOUNG, *Clerk.*

377 EXHIBIT "O."

Indictment #308.

In the Circuit Court of the United States of America for the Southern District of New York, of the May Term, in the Year Nineteen Hundred and Eight.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The grand jurors for the United States of America, empaneled and sworn in the Circuit Court of the United States for the Southern District of New York, and inquiring for that district, upon their oath present, that before and during the three years last past the United States, through the Department of Agriculture and a certain bureau of that department, to wit, the Bureau of Statistics, has exercised the governmental function of acquiring and diffusing among the people of the United States useful information on subjects connected with Agriculture, including the subject of cotton; that in acquiring such information pertaining to cotton the United States, through the said department and bureau, has made use of divers agencies, to wit, among others correspondence with cotton planters and dealers in and ginners of cotton, through employees and agents of the said department and bureau located in the several states where cotton is grown, and through special investigations in the field by employees and agents of the said department and bureau; and that in diffusing the said information pertaining to cotton the United States has issued, on or near the third day of each of the months of June, July, August, September, October and December in
378 each year crop reports embracing statements, based upon the information so acquired, of the conditions of the cotton crop by states, in the United States, with such explanations, comparisons and information as might be useful for illustrating that matter, which said cotton crop reports have been by law required to be submitted to and officially approved by the Secretary of Agriculture before so being issued or published; and that under the practice, custom and regulation of the said department established and sanctioned by the said Secretary of Agriculture, no officer or employee thereof to whom such information might come by reason of his office or employment has been permitted to issue, publish or divulge to unauthorized persons, and all such officers and employees have been prohibited from issuing, publishing or divulging to unauthorized persons, any such information so acquired as aforesaid, or any such cotton crop report, or any information indicating the probable contents or character of the same, in advance of its official issuance and publication, or without its first being submitted to and officially approved by the said Secretary.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that Theodore H. Price, Moses Haas and Edwin S. Holmes, junior, each late of the City of New York, in the said Southern District of New York, on the thirty-first day of May, in

the year nineteen hundred and five, at and within the said city and Southern District of New York, unlawfully did knowingly
379 conspire, combine, confederate and agree together, and with divers other persons to the said grand jurors unknown, to defraud the United States of and concerning its governmental function in the matter of issuing and publishing the cotton crop report to be issued and published by the said department and bureau in the then next succeeding month of June, and of its right to administer an intelligent and honest service in that behalf in the interests of the people of the United States, to be accomplished by the means and methods and under the circumstances and conditions now here set forth and described; that is to say:

The said Edwin S. Holmes, junior, before and on the day last aforesaid, was an officer and employee of the said department and Bureau, to wit, Associate Statistician thereof, and a portion of the information upon which the said cotton-crop report was to be based, and which had been acquired by the said department and bureau in the manner aforesaid, and indicated the probable contents and character of the said report, had come and was known to the said Edwin S. Holmes, junior, in his capacity as such officer and employee; and thereafter, and before the time of the official issuance and publication of the said report, other like information would come to and be known to the said Edwin S. Holmes, junior, in his said capacity.

The said Theodore H. Price and Moses Haas, who then and there were neither officers nor employees either of the said department or of the said bureau, and who then and there were persons not
380 in any manner authorized to have or know the information last aforesaid, or to be informed as to the probable contents or character of the said crop report in advance of its said official issuance and publication, or without such report being first submitted to and officially approved by the said Secretary, and who well knew all the premises in this indictment above set forth, were thereafter, and in advance of the said official issuance and publication of the said cotton-crop report, to obtain and receive from the said Edwin S. Holmes, junior, and the said Edwin S. Holmes, junior, also then well knowing the said premises, was to give and divulge to them the said Theodore H. Price and Moses Haas, information which as aforesaid had and would come and be known to him, the said Edwin S. Holmes, junior, in his said capacity as an officer and employee of the said department and bureau, and this without the said cotton crop report being first submitted to and officially approved by the Secretary of Agriculture; it being the design and intention of the said Theodore H. Price, Moses Haas and Edwin S. Holmes, junior, in so doing to make use of the said information, before the lawful issuance and publication of the said report, for their pecuniary benefit, in speculating in cotton, in view of the probable effect upon the market price of that commodity which the subsequent lawful issuance and publication of the said cotton-crop report would have, and in other ways to the said Grand Jurors unknown.

381 *Overt Acts.*

1. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Theodore H. Price and Moses Haas afterwards, to wit, on the said thirty-first day of May, in the year nineteen hundred and five, at the Waldorf-Astoria Hotel, in the said city of New York, and in the said Southern District of New York, unlawfully did meet together to confer concerning the said unlawful conspiracy, combination, confederation and agreement.

2. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Moses Haas afterwards, to wit, on the first day of June, in the year nineteen hundred and five, unlawfully did journey from the said City of New York, in the said Southern District of New York, to the City of Washington, in the District of Columbia.

3. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Edwin S. Holmes, junior, afterwards, to wit, on the said first day of June, in the year nineteen
382 hundred and five, at the District of Columbia, unlawfully did give the information in this indictment above mentioned, pertaining to the cotton-crop report in this indictment above described, which had on and before that date been acquired by the said department and bureau in the manner hereinabove set forth, to the said Moses Haas, for transmission by him to the said Theodore H. Price.

4. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Edwin S. Holmes, junior, afterwards, to wit, on the second day of June, in the year nineteen hundred and five, and before the official issuance and publication of the said cotton-crop report, at the District of Columbia, unlawfully did give the information in this indictment above mentioned, pertaining to the cotton-crop report in this indictment above described, which had on and before that date been acquired by the said department and bureau in the manner hereinabove set forth, to the said Moses Haas, for transmission by him to the said Theodore H. Price.

5. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Theodore H. Price afterwards,
383 to wit, on the said second day of June, in the year nineteen hundred and five, and before the official issuance and publication of the said cotton-crop report, at and within the said City

and Southern District of New York, unlawfully did receive from the said Moses Haas the information last above-mentioned.

And so the Grand Jurors aforesaid, upon their oath aforesaid, do say, that the said Theodore H. Price, Moses Haas and Edwin S. Holmes, junior, at the time and place and in manner and form aforesaid, unlawfully did conspire together and with others, to defraud the United States, and did each do acts to effect the object of the said conspiracy; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

384 *Second Count.*

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that in the administrative arrangement of the business of the Department of Agriculture of the said United States on and before the fifteenth day of November, in the year nineteen hundred and four, there was, and thence hitherto there has been, a bureau designated and known as the Bureau of Statistics; and that during the time and times aforesaid the said Bureau was under the management of an officer and employee of the said United States and of the said Department of Agriculture, designated and known as Statistician and as chief of the Bureau of Statistics; and that during the time and times aforesaid there were in the said Bureau other officers and employees of the said United States and of the said Department of Agriculture, one of whom was designated and known as associate statistician and another of whom was designated and known as assistant statistician and as assistant chief of the Bureau of Statistics; and that during the time and times aforesaid whenever the said statistician was absent from his said office, the said Bureau was under the management of the said associate statistician, who acted in the place and stead of said statistician as chief of said bureau.

And that during the time and times aforesaid the said statistician with the aid and assistance of the said associate statistician and of the other officers and employees of the said United States employed in said Bureau, and in the absence of the said statistician, the
385 said associate statistician with the aid and assistance of the other officers and employees aforesaid of said Bureau, was charged with the duty of preparing during certain months in each year certain reports upon the condition of certain of the crops grown and raised in the United States, which reports became known as and were called crop reports, and that each of said crop reports was by law required to embrace statements of the conditions of the crops therein mentioned by states of the said United States, with such explanations, comparisons and information as might be useful for illustrating the matter contained in said reports, and that each of such reports was required by law to be submitted to and officially approved by the Secretary of Agriculture before being issued or published; that each of said reports was prepared by the said statistician or the said associate statistician in the manner aforesaid, from certain information collected by the said bureau from divers sources, as

proved by the said bureau; amongst others being certain correspondents of the said Bureau of Statistics residing in those parts of the United States where were grown the particular crops upon which they furnished information, and who were persons having special knowledge upon the subject, and certain employees of the said Bureau, known as Statistical Agents, and certain other expert employees of the said Bureau, whose duty it was to travel throughout the United States and ascertain the condition of the said
386 crops; and that during the time and times aforesaid whenever the said statistician or the said associate statistician had as aforesaid prepared any of said reports, he, the said statistician, or the said associate statistician, as the case might be, in accordance with the requirements of law last aforesaid submitted the said report so prepared to the Secretary of Agriculture for the latter's official approval; and that whenever any of said reports was so submitted to said Secretary of Agriculture for his official approval, he, the Secretary of Agriculture, in the usual course of business in his said Department, and relying upon the proper performance of his duty in the preparation of said report by the said statistician or by the said associate statistician, as the case might be, officially approved the same; and that after such official approval by the said Secretary of Agriculture thereof, and not until such approval was given, each of said reports was issued and published by the said Department of Agriculture.

And that during the time and times aforesaid, the said crop reports were prepared, approved and issued and published for the purpose of diffusing the information therein contained among the people of the United States and that said crop reports were prepared at great expense to the said United States and were to be as nearly fair, impartial, correct and accurate as it was possible for such reports to be; and the said crop reports and each of them upon
387 their issuance and publication after being submitted to and officially approved by the Secretary of Agriculture as aforesaid, did affect to a greater or less extent the market price of the several crops therein mentioned.

That during the time and times aforesaid a custom and practice prevailed in the said Department of Agriculture, established and sanctioned by the said Secretary, under which the giving out to the public of any information collected by the said Bureau of Statistics or its said officers or its said employees to be used in the preparation of, or to be contained in, any of said crop reports, was prohibited, and the keeping of such information secret was required, except such information as was contained in said crop reports when and after the same had been officially issued and published.

And that during the time and times aforesaid it was the duty of the said statistician and of the said associate statistician and said other officials and employees aforesaid of the said Bureau of Statistics to prepare a true and accurate report upon each of the said crops, from the information as to said crops obtained as aforesaid and without regard to the influence which any such report might have upon the market price of the crop therein mentioned.

And that during the time and times aforesaid the said statistician and associate statistician and the other officers and employees aforesaid of the said Bureau of Statistics were charged with the
388 duty of honestly and carefully guarding and keeping secret and of not divulging to any person not employed in or connected with the said Bureau of Statistics any information acquired by him or them in the course of preparing and assisting in preparing the said crop reports and in collecting statistics and compiling statistical matter for use in the preparation of said crop reports, or any of the matter and things and other information which might be contained in any of the said crop reports, until said crop reports had been prepared, officially approved, and issued and published as aforesaid, and thereafter said duty of so maintaining secrecy as aforesaid continued save and except as to the matters and things so officially made public in said reports.

And that among the said crop reports so prepared by the said statistician with the aid and assistance of said associate statistician and said other officers and employees of the said Bureau of Statistics, and in the absence of said statistician, so prepared by the said associate statistician with the aid and assistance of said other officers and employees of the said Bureau of Statistics as aforesaid, and so submitted to and officially approved by the said Secretary of Agriculture, and so issued and published by the Department of Agriculture as aforesaid, was a report upon the cotton crop of the United States, which was known as and called the cotton crop report, and which said cotton crop report during the time and times
389 aforesaid was issued and published on or about the third day of each of the months of June, July, August, September, October and December in each year.

That on the sixteenth day of November in the year nineteen hundred and three, and thence continuously until the ninth day of June in the year nineteen hundred and five, one Edwin S. Holmes, junior, held and occupied the office of, and was, such associate statistician in said Bureau of Statistics in the Department of Agriculture, and as such associate statistician, the said Edwin S. Holmes, junior, was during the period last aforesaid charged with the duty of aiding and assisting the said statistician in the preparation of said crop reports including said cotton crop reports, and, in the absence of the said statistician the said Edwin S. Holmes, junior, as such associate statistician, was during the period last aforesaid charged with the duty of preparing with the aid and assistance of said other officers and employees of said Bureau as aforesaid all of the said crop reports including the said cotton crop reports as aforesaid, and that during the period last aforesaid, in the performance of his duties as said associate statistician in assisting the said statistician in the preparation of said crop reports including said cotton crop reports, and, in the absence of the said statistician, in the performance of his duties in preparing said crop reports, including the said cotton crop reports, he, the said Edwin S. Holmes, junior, did, before the official approval and issuance and publication of each of said
390 crop reports, including the cotton crop reports, acquire and have knowledge of the statistics and statistical matter from

which said crop reports, including said cotton crop reports, were prepared and of the matters and things and other information which were to be contained in each of said crop reports including said cotton crop reports.

And that during the period last aforesaid it was the duty of said Edwin S. Holmes, junior, as such associate statistician, whenever he prepared or assisted in preparing any of said reports to prepare and assist in preparing a true and accurate report from the information as to said crops obtained as aforesaid and without regard to the effect which such report might have upon the market price of the crop therein mentioned, and honestly and carefully to guard and keep secret and not to divulge to any person not employed in or connected with said Bureau of Statistics any of the said statistics and statistical matter and information from which said crop reports including said cotton crop reports were to be prepared, and of the matters and things and other information which were to be contained in any of the said crop reports, including said cotton crop reports, knowledge of which was so as aforesaid acquired by him the said Edwin S. Holmes, junior, as such associate statistician, until the said reports had been prepared, officially approved and issued and published as aforesaid, and it was the duty of the said Edwin
391 S. Holmes, junior, as said associate statistician, thereafter honestly and carefully to guard and keep secret and not divulge to any person not employed in or connected with said Bureau any of the statistics and statistical matter and matters and things and other information last aforesaid, knowledge of which was so as aforesaid acquired by him, except such matters and things and other information as were included in and officially made public in said reports.

All and singular of which the premises and several premises in this count aforesaid, in so far as they were then existent, were known to the said Edwin S. Holmes, junior, and to a certain Theodore H. Price and to a certain Moses Haas, at the time of the commission by them of the offense hereinafter set forth.

That on the fifteenth day of November, in the year nineteen hundred and four, and continuously and at all times between said fifteenth day of November, nineteen hundred and four, and the fifth day of July, nineteen hundred and five, and on said day last aforesaid and at the City of New York in the Southern District of New York, the said Edwin S. Holmes, junior, Theodore H. Price and Moses Haas unlawfully, corruptly and fraudulently did conspire, combine, confederate and agree together with certain others persons to the Grand Jurors aforesaid unknown, to defraud the United States in the dishonest and corrupt manner and through and by means of the dishonest and corrupt scheme and arrangement following
392 that is to say: That in violation of the said duty of him, the said Edwin S. Holmes, junior, as such associate statistician honestly and carefully to keep secret all statistics and statistical matter and information, knowledge of which was acquired by him as aforesaid as such associate statistician, and in advance of the official issuance and publication of each of said cotton crop reports, as herein-

before set forth, and in advance of the time or times when the matter and information contained in each of said cotton crop reports could lawfully be made public, and to prevent, obstruct and impair the due and orderly administration of the business and affairs of said Department of Agriculture, and to the prejudice of the said United States, he, the said Edwin S. Holmes, junior, should and would thereafter in so far as in him the power lay, furnish to the said Moses Haas and to the said Theodore H. Price, the statistics and matter and information which were to be contained in each of said cotton crop reports, knowledge of which was as aforesaid, acquired by the said Edwin S. Holmes, junior, in the performance of his duty as such associate statistician.

Overt Acts.

1. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, and at the District of Columbia aforesaid, and on the twentieth day of November, nineteen hundred and four, and
393 on divers other days between the said day last aforesaid and the third day of December in the same year, the said Edwin S. Holmes, junior, unlawfully and corruptly did communicate to the said Moses Haas statistics and matter and information which were to be contained in the said cotton crop report to be issued on the day last aforesaid, and which had been acquired by the said Edwin S. Holmes, junior, in the performance of his duties as such associate statistician.

2. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Moses Haas on the day and days last aforesaid, and at the said City and Southern District of New York, unlawfully and corruptly did communicate to the said Theodore H. Price the information so furnished to him by the said Edwin S. Holmes, junior, as aforesaid.

3. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Theodore H. Price and Moses Haas afterwards, to wit, on the thirty first day of May in the year nineteen hundred and five, in the said city of New York, and in the said Southern District of New York, unlawfully did meet together
394 to confer concerning the said unlawful conspiracy, combination, confederation and agreement.

4. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Moses Haas afterwards, to wit, on the first day of June, in the year nineteen hundred and five, unlawfully did journey from the said City of New York, in the said Southern District of New York, to the City of Washington, in the District of Columbia.

5. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Edwin S. Holmes, junior, afterwards, to wit, on the said first day of June, in the year nineteen hundred and five, and at the District of Columbia aforesaid, unlawfully and corruptly did communicate to the said Moses Haas information which was to be contained in said cotton crop report to be thereafter issued in said month of June, which information had been acquired by the said Edwin S. Holmes, junior, as aforesaid, in the performance of his official duty.

6. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful
395 conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Edwin S. Holmes, junior, afterwards, to wit, on the second day of June, in the year nineteen hundred and five, and at the District of Columbia aforesaid, and before the official issuance and publication of the said cotton crop report last mentioned, unlawfully and corruptly did communicate to the said Moses Haas further information which was to be contained in said last mentioned cotton crop report and which had been acquired by the said Edwin S. Holmes, junior, in the performance of his said official duty.

7. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Theodore H. Price afterwards, to wit, on the said first and second days of June, in the year nineteen hundred and five, and before the official issuance and publication of the said cotton crop report, at and within the said City and Southern District of New York, unlawfully did receive from the said Moses Haas the information last above mentioned.

And so the Grand Jurors aforesaid, upon their oath aforesaid, do say, that the said Theodore H. Price, Moses Haas and Edwin S. Holmes, junior, at the time and place and in manner and form in this count aforesaid, unlawfully did conspire together, and with others to defraud the United States, and did each do acts to
396 effect the object of the said conspiracy; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

397 *Third Count.*

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that on the thirty-first day of May, nineteen hundred and five, under the circumstances and conditions in the second count of this indictment set forth and averred pertaining to the organization and existence of the Bureau of Statistics in the Department of Agriculture, and pertaining to the employment of the said officers and employees of the said Bureau and Department in that count mentioned and their duties in regard to the preparation, issuance, publication and character of the crop reports therein men-

tioned, including the cotton crop reports, and pertaining to the custom and practice which prevailed in said Bureau with reference to the keeping secret of the information collected by said Bureau in the preparation of said crop reports, and information to be contained in said reports, and pertaining to the duty which was imposed upon said officers and employees of the said Department and Bureau therein mentioned of keeping secret and not divulging any of such information, and pertaining to the employment and duties as associate statistician of said Edwin S. Holmes, junior, as therein set forth, and which are now here again alleged to have existed on the day in this count mentioned, at the said city of New York in the said Southern District of New York, the said Edwin S. Holmes, junior, the said Moses Haas and the said Theodore H. Price unlawfully,
398 corruptly and fraudulently did conspire, combine, confederate, and agree together and with divers other persons to the Grand Jurors aforesaid unknown to defraud the United States in the dishonest and corrupt manner and through and by means of the dishonest and corrupt scheme and arrangement following, that is to say:

In violation of the duty of him, the said Edwin S. Holmes, junior, to prepare and assist in preparing the said cotton crop reports truly and accurately from the information as to said crops obtained as aforesaid and without regard to the influence of such reports upon the market price of cotton, the said Edwin S. Holmes, junior, in assisting in preparing the said cotton-crop report to be issued in the month of June then next following, was to cause and procure the said report to be untrue and inaccurate by causing said report to state that there had been planted in cotton throughout the United States a greater number of acres of land and that the condition of the cotton crop was better than would be shown by such report if it had been based upon the information as to said cotton crop obtained as aforesaid and had been truly and accurately prepared.

And in violation of the said duty of him, the said Edwin S. Holmes, junior, as such associate statistician honestly and carefully to keep secret all statistics and statistical matter and information, knowledge of which was acquired by him as associate statistician as
399 aforesaid, and in advance of the official issue and publication of the said cotton crop report to be published in the month of June then next following, and in advance of the time when the matters and information to be contained in said cotton crop report could lawfully be made public, and to prevent, obstruct and impair the due and orderly administration of the business and affairs of said Department of Agriculture, and to the prejudice of the said United States, he, the said Edwin S. Holmes, junior, was, in so far as in him the power lay, to furnish to the said Moses Haas and to the said Theodore H. Price the statistics and matter and information which were to be contained in said report, knowledge of which was as aforesaid acquired by the said Edwin S. Holmes, junior, in the performance of his duty as such associate statistician.

400 *Overt Acts.*

1. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Theodore H. Price and Moses Haas afterwards, to wit: on the said thirty-first day of May, in the year nineteen hundred and five, at the said City of New York, and in the said Southern District of New York, unlawfully did meet together to confer concerning the said unlawful conspiracy, combination, confederation and agreement.

2. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Moses Haas afterwards, to wit, on the first day of June, in the year nineteen hundred and five, unlawfully did journey from the said City of New York, in the said Southern District of New York, to the City of Washington, in the District of Columbia.

3. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Edwin S. Holmes, junior, afterwards, to wit, on the said first day of June, in the year nineteen hun-

401 dred and five, and at the District of Columbia aforesaid unlawfully did communicate to the said Moses Haas information which was to be contained in said cotton crop report to be thereafter issued in said month of June which information had been acquired by said Holmes as aforesaid in the performance of his official duty.

4. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, and at the District of Columbia aforesaid the said Edwin S. Holmes, junior, afterwards, to wit, on the second day of June, in the year nineteen hundred and five, and before the official issuance and publication of the said last mentioned cotton crop report, unlawfully did communicate to the said Moses Haas further information which was to be contained in said cotton-crop report, and which had been acquired by the said Holmes in the performance of his said official duty.

5. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Theodore H. Price afterwards, to wit, on the said first and second days of June, in the year nineteen hundred and five, and before the official issuance and publication of the said cotton-crop report, at and within the said City and Southern District

of New York, unlawfully did receive from the said Moses

402 Haas the information last above mentioned.

6. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Theodore H. Price afterwards,

to wit, on the second day of June, in the year nineteen hundred and five, and at the said City and Southern District of New York, did prepare and send to the said Bureau of Statistics a telegram of the tenor following:

"NEW YORK, *June* 2, 1905.

"John Hyde, Wash., D. C.:

"Your report upon cotton acreage just issued reads as follows: "'The Bureau report shows a total area planted in cotton up to "'May 25th to be about 28,120,000 acres, a decrease of about "'3,610,000 acres, or 11.4 per cent., from total acreage planted last "'year.

"'Will you kindly telegraph me at my expense immediately "'whether this means that 28,120,000 acres have actually been "'planted up to May 25th and that therefore any acreage planted "'after May 25th will be an increase upon the number of acres "'reported as planted in your report of today.

"THEODORE H. PRICE."

7. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Edwin S. Holmes, junior, thereafter, and on the said second day of June, in the year nineteen hundred and five, at the City of Washington, District of Columbia, did cause to be prepared and sent to the said Theodore H. Price at the
403 said City of New York a telegram of the tenor following:

"*Statistics.*

WASHINGTON, D. C., *June* 2, 1905.

Theodore H. Price, 82 Beaver St., New York:

"Report indicates about twenty-eight million one hundred twenty thousand acres actually planted up to May 25.

HYDE."

And so the Grand Jurors aforesaid, upon their oath aforesaid, do say, that the said Theodore H. Price, Moses Haas and Edwin S. Holmes, junior, at the time and place and in manner and form in this count of this indictment aforesaid unlawfully did conspire together, and with others, to defraud the United States and did each do acts to effect the object of the said conspiracy; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

HENRY L. STIMSON,
United States Attorney.

(Endorsed:) U. S. Circuit Court. The United States of America *vs.* Theodore H. Price, Edwin S. Holmes, junior, Moses Haas. Indictment. Conspiracy to defraud the United States, U. S. Rev. Stat. Sec. 5440.—Henry L. Stimson, U. S. Attorney.—A True Bill. John E. Holshan, Foreman.—U. S. Circuit Court, Southern District of New York. Filed May 29th, 1908. John A. Shields, Clerk.

404 EXHIBIT "P."

Indictment # 309.

In the Circuit Court of the United States of America for the Southern District of New York, of the May Term in the Year Nineteen Hundred and Eight.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The grand jurors for the United States of America, empaneled and sworn in the Circuit Court of the United States for the Southern District of New York, and inquiring for that district, upon their oath present:

That in the administrative arrangement of the business of the Department of Agriculture of the said United States on and before the thirty first day of May, in the year nineteen hundred and five, there was, and thence hitherto there has been, a bureau designated and known as the Bureau of Statistics; and that during the time and times aforesaid the said Bureau was under the management of an officer and employé of the said United States and of the said Department of Agriculture designated and known as statistician and as Chief of the Bureau of Statistics; and that during the time and times aforesaid there were in the said Bureau other officers and employés of the said United States and of the said Department of Agriculture, one of whom was designated and known as Associate Statistician and another of whom was designated and known as assistant statistician and as assistant chief of the Bureau of Statistics; and that during the time and times aforesaid whenever the said statistician was absent from his said office, the said Bureau
405 was under the management of the said associate statistician, who acted in the place and stead of said statistician as chief of said Bureau.

And that during the time and times aforesaid the said statistician with the aid and assistance of the said associate statistician and of the other officers and employees of the said United States employed in said Bureau, and in the absence of the said statistician, the said associate statistician with the aid and assistance of the other officers and employees aforesaid of said Bureau, was charged with the duty of preparing during certain months in each year certain reports upon the conditions of certain of the crops grown and raised in the United States, which reports became known as and were called crop reports, and that each of said crop reports was by law required to embrace statements of the conditions of the crops therein mentioned by states of the said United States, with such explanations, comparisons and information as might be useful for illustrating the matter contained in said reports, and that each of such reports was required by law to be submitted to and officially approved by the Secretary of Agriculture before being issued or published.

That each of said reports was prepared by the said statistician or the said associate statistician in the manner aforesaid, from certain

information collected by the said Bureau from divers sources approved by the said Bureau; amongst others being certain correspondents of the said Bureau of Statistics residing in those
406 parts of the United States where were grown the particular crops upon which they furnished information, and who were persons having special knowledge upon the subject, and certain employees of the said Bureau, known as Statistical Agents and certain other expert employees of the said Bureau, whose duty it was to travel throughout the United States and ascertain the conditions of the said crops.

And that during the time and times aforesaid whenever the said statistician or the said associate statistician had as aforesaid prepared any of said reports, he, the said statistician, or the said associate statistician, as the case might be, in accordance with the requirement of law last aforesaid submitted the said report so prepared to the Secretary of Agriculture for the latter's official approval; and that whenever any of said reports were so submitted to said Secretary of Agriculture for his official approval, he, the said Secretary of Agriculture, in the usual course of business in his said Department, and relying upon the proper performance of his duty in the preparation of said report by the said statistician or by the said associate statistician, as the case might be, officially approved the same; and that after such official approval by the said Secretary of Agriculture thereof, and not until such approval was given, each of said reports was issued and published by the said Department of Agriculture.

And that during the time and times aforesaid, the said
407 crop reports were prepared, approved, and issued and published for the purpose of diffusing the information therein contained among the people of the United States, and that said crop reports were prepared at great expense to the said United States and were to be fair, impartial, correct and accurate; and the said crop reports and each of them upon their issuance and publication after being submitted to, and officially approved by the Secretary of Agriculture as aforesaid, did affect to a greater or less extent the market price of the several crops mentioned therein.

That during the time and times aforesaid a custom and practice prevailed in the said Department of Agriculture, established and sanctioned by the said Secretary, under which the giving out to the public of any information collected by the said Bureau of Statistics or its said officers or its said employees to be used in the preparation of or to be contained in any of said crop reports was prohibited, and the keeping of such information secret was required, except such information as was contained in said crop reports when and after the same had been officially issued and published. And that during the time and times aforesaid it was the duty of the said statistician and of the said associate statistician and the said other officials and employees aforesaid of the said Bureau of Statistics to prepare a true and accurate report upon each of the said crops from the information as to said crops obtained as aforesaid, and without re-
408 gard to the influence which any such report might have upon the market price of the crop therein mentioned.

And that during the time and times aforesaid the said statistician and the said associate statistician and the other officers and employees aforesaid of the said Bureau of Statistics were charged with the duty of honestly and carefully guarding and keeping secret and of not divulging to any person not employed in or connected with said Bureau of Statistics any information acquired by him or them in the course of preparing and assisting in preparing the said crop reports and in collecting statistics and compiling statistical matter for use in the preparation of said crop reports, or any of the matters and things and other information which might be contained in any of said crop reports, until said crop reports had been prepared, officially approved, and issued and published as aforesaid, and thereafter said duty of so maintaining secrecy as aforesaid continued save and except as to the matters and things so officially made public in said reports.

And that among the said crop reports so prepared by the said statistician with the aid and assistance of said associate statistician and said other officers and employees of the said Bureau of Statistics, and, in the absence of the said statistician, so prepared by the said associate statistician with the aid and assistance of said
409 other officers and employees of the said Bureau of Statistics as aforesaid, and so submitted to and officially approved by the said Secretary of Agriculture as aforesaid, was a report upon the cotton crop of the United States, which became known as and was called the cotton-crop report, and which said cotton-crop report during the time and times aforesaid was issued and published on or about the third day of each of the months of June, July, August, September, October and December in each year.

That on the sixteenth day of November, in the year 1903, and thence continuously until the ninth day of June, in the year 1905, one Edwin S. Holmes, Jr., held and occupied the office of, and was, such associate statistician in the said Bureau of Statistics in the Department of Agriculture, and as such was an officer of the United States and a person acting for and on behalf of the United States in an official function under and by authority of the said Department and Bureau and as such associate statistician the said Edwin S. Holmes, Jr., was during the period last aforesaid charged with the duty of aiding and assisting the said statistician in the preparation of said crop reports including said cotton crop report, and, in the absence of the said statistician from his office, the said Edwin S. Holmes, Jr., as such associate statistician, was during the period last aforesaid charged with the duty of preparing with the aid and assistance of said other officers and employees of said Bureau
410 as aforesaid all of the said crop reports including the said cotton crop reports as aforesaid, and that during the period last aforesaid, in the performance of his duties as said associate statistician in assisting the said statistician in the preparation of said crop reports, including said cotton crop reports, and, in the absence of the said statistician, in the performance of his duties in preparing said crop reports, including the said cotton-crop reports, he, the said Edwin S. Holmes, Jr., did, before the official approval and issuance and publication of each of said crop reports, including

the said cotton crop reports, acquire and have knowledge of the statistics and statistical matter from which said crop reports, including said cotton crop reports, were prepared and of the matters and things and other information which were to be contained in each of said crop reports including said cotton crop reports.

And that during the period last aforesaid it was the duty of said Edwin S. Holmes, junior, as such associate statistician, whenever he prepared or assisted in preparing any of said reports to prepare and assist in preparing a true and accurate report from the information as to said crops obtained as aforesaid, and without regard to the effect which such report might have upon the market price of the crop therein mentioned, and honestly and carefully to guard and keep secret and not to divulge to any person not employed in or connected with said Bureau of Statistics any of the said
411 statistics and statistical matter and information from which said crop reports, including said cotton crop reports, were to be prepared, and of the matters and things and other information which were to be contained in any of said crop reports, including said cotton crop reports, knowledge of which was so as aforesaid acquired by him the said Edwin S. Holmes, junior, as such associate statistician, until the said reports had been prepared, officially approved and issued and published as aforesaid, and it was the duty of the said Edwin S. Holmes, junior, as said associate statistician, to thereafter honestly and carefully guard and keep secret and not divulge to any person not employed in or connected with said Bureau any of the statistics and statistical matter and matters and things and other information last aforesaid, knowledge of which was so as aforesaid acquired by him except such matters and things and other information as were included in and officially made public in said reports.

All and singular of which the premises and several premises aforesaid, in so far as they were then existent were known to a certain Theodore H. Price and to a certain Moses Haas, at the time of the commission by them of the offense hereinafter set forth.

That on the thirty first day of May, in the year 1905, in the City of New York, and the Southern District of New York, one Moses Haas and one Theodore H. Price unlawfully did conspire, combine, confederate and agree together to commit an offense against
412 the United States; that is to say, the offense of promising, offering and giving to an officer of the United States, and a person acting for and on behalf of the said United States in an official function under and by virtue of a certain Department and office of the Government thereof; that is to say, to the said Edwin S. Holmes, Jr., associate statistician of the said Bureau of Statistics as aforesaid, a sum of money, the amount of which is to the Grand Jurors aforesaid unknown, to induce him, the said Edwin S. Holmes, Jr., to do certain acts in violation of his lawful duty; that is to say, to induce him, the said Edwin S. Holmes, Jr., unlawfully and in violation of the said duty of him, the said Edwin S. Holmes, Jr., as such associate statistician, honestly and carefully to keep secret all statistics and statistical matter and information, knowledge of

which was required by him as aforesaid as such associate statistician, and in advance of the official issue and publication of the said cotton crop reports, which was to be issued as hereinbefore set forth, in the month of June next ensuing, and in the advance of the time when the matter and information contained in such cotton-crop report could lawfully be made public, to furnish, in so far as in him the power lay, to the said Moses Haas and the said Theodore H. Price, the statistics, matter and information which were to be contained in said report, knowledge of which was, as aforesaid, acquired
413 by said Edwin S. Holmes, Jr., in the performance of his duties as such associate statistician.

Overt Acts.

1. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Theodore H. Price and Moses Haas afterwards, to wit, on the thirty-first day of May, in the year 1905, at the said City of New York, and in the said Southern District of New York, unlawfully did meet together to confer concerning the said unlawful conspiracy, combination, confederation and agreement.

2. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Moses Haas afterwards, to wit, on the first day of June, in the year 1905, unlawfully did journey from the said City of New York, in the said Southern District of New York, to the City of Washington, in the District of Columbia.

3. And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, on the said first day of June, in the year 1905, and at the City of Washington, in the District of Co-
414 lumbia aforesaid, the said Moses Haas unlawfully did promise and offer to give to the said Edwin S. Holmes, Jr., who was then as aforesaid an officer of the United States and a person acting for an- on behalf of the United States in an official function under and by virtue of a certain department and office of the Government thereof, a sum of money, the amount of which is to the Grand Jurors aforesaid unknown, to induce him, the said Edwin S. Holmes, Jr., in violation of the said duty of secrecy of him, the said Edwin S. Holmes, junior, as hereinbefore set forth, and in advance of the official issue and publication of the said cotton crop report, which was to be issued in the said month of June, to furnish to him the said Moses Haas, and to the said Theodore H. Price, the statistics, matter and information, which were to be contained in the said last mentioned report.

4. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Moses Haas afterwards, to wit, on said

first day of June, in the year nineteen hundred and five, at the City of Washington, in the District of Columbia aforesaid, unlawfully did receive from the said Edwin S. Holmes given information which was to be contained in said cotton crop report which was to be issued in said month of June, which information had been acquired by the said Department and Bureau in the manner hereinabove set
415 forth.

5. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, at the City of Washington, in the District of Columbia aforesaid, on the second day of June, in the year nineteen hundred and five, and before the official issuance and publication of the said cotton-crop report, the said Moses Haas unlawfully did receive from said Edwin S. Holmes, junior, further information which was to be contained in said cotton crop report which was to be issued in said month of June, and which information had been acquired by the said Department and Bureau in the manner hereinabove set forth.

6. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Theodore H. Price, on the said first and second days of June, in the year nineteen hundred and five, and before the official issuance and publication of the said cotton crop report, at and within the said City and Southern District of New York, unlawfully did receive from the said Moses Haas the information last above mentioned.

7. And the grand jurors aforesaid, upon their oath aforesaid, do further present that further in pursuance of the said unlawful
416 conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Moses Haas, on the said second day of June, in the year nineteen hundred and five, and at the District of Columbia aforesaid, unlawfully did give to the said Edwin S. Holmes, junior, the sum of one thousand dollars.

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that the said Theodore H. Price and Moses Haas, at the times and place and in manner and form aforesaid, unlawfully did conspire together, and with others to commit an offense against the United States, and did each do acts to effect the object of the said conspiracy; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

Second Count.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that on the thirty first day of May, in the year 1905, under the circumstances and conditions in the first count of this indictment set forth and averred, pertaining to the organization and existence of the Bureau of Statistics in the Department of Agriculture, and pertaining to the employment of the said officers and employees of the said Bureau and Department in that count men-

tioned, and their duties in regard to the preparation, issuance,
417 publication and character of the crop reports therein mentioned, including the cotton crop reports, and pertaining to the custom and practice which prevailed in said Bureau with reference to the keeping secret of the information collected by said Bureau in the preparation of said crop reports, and information to be contained in said reports and pertaining to the duty which was imposed upon said officers and employees of the said Department and Bureau therein mentioned of keeping secret and not divulging any of such information, and pertaining to the employment and duties as associate statistician of said Edwin S. Holmes, Jr., as therein set forth, and which are now here again alleged to have existed on the day in this count above mentioned, and while the said Edwin S. Holmes, Jr., was, as averred in said first count of this indictment such officer of the United States and a person acting for and on behalf of the United States in an official function under and by authority of the said Department and Bureau, and at the said City of New York in the said Southern District of New York, the said Moses Haas and the said Theodore H. Price unlawfully did conspire, combine, confederate and agree together to commit an offense against the United States; that is to say: the offense of promising, offering and giving to an officer of the United States and a person acting for and on behalf of the United States in an official function under and by virtue of a certain Department and office of the Government thereof;
418 that is to say: to the said Edwin S. Holmes, Jr., associate statistician of the said Bureau of Statistics as aforesaid, a sum of money, the amount of which is to the grand jurors aforesaid unknown, to induce him, the said Edwin S. Holmes, Jr., to do certain acts in violation of his lawful duty; that is to say: to induce him, the said Edwin S. Holmes, Jr., in violation of the duty of him, the said Edwin S. Holmes, Jr., to prepare and assist in preparing the said cotton-crop reports truly and accurately from the information as to said crops obtained as aforesaid, and without regard to the influence of such reports upon the market price of cotton, unlawfully and corruptly in assisting in preparing the said cotton crop report which was to be issued in the month of June, then next following, to cause and procure said last mentioned report to be untrue and inaccurate by causing such report to state that there had been planted in cotton throughout the United States a greater number of acres of land, and that the condition of the said cotton crop was better than would be shown by such report if it had been based upon the information as to said cotton crop obtained as aforesaid, and had been truly and accurately prepared; and further to induce him, the said Edwin S. Holmes, Jr., in violation of the said duty of him, the said Edwin S. Holmes, Jr., as such associate statistician honestly and carefully to keep secret all statistics and statistical matter and information, knowledge of which was acquired by him as associate
419 statistician as aforesaid, and in advance of the official issue and publication of the said last mentioned report, and in advance of the time when the matters and information to be contained in said last mentioned cotton crop report could lawfully be

made public, to furnish, in so far as in him the power lay, to the said Moses Haas and the said Theodore H. Price, the statistics, matter and information which were to be contained — the said last-mentioned report, knowledge of which was, as aforesaid, acquired by the said Edwin S. Holmes, junior, in the performance of his duty as such associate statistician.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that in pursuance of said last mentioned unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, and at the places and at the times in the first count hereof set forth, the said Theodore H. Price and the said Moses Haas each did do and perform the several overt acts averred and alleged in the said first count to have been done and performed by the said Moses Haas and the said Theodore H. Price in pursuance of and to effect the object of the conspiracy in the said first count averred.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Moses Haas and the said Theodore H. Price, at the time and place and in the manner and form in this count aforesaid, unlawfully did conspire together to commit an offense against
120 the United States, and did each do acts to effect the object of said conspiracy; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

HENRY L. STIMSON,
United States Attorney.

121 (Endorsed:) United States Circuit Court. The United States of America *vs.* Theodore H. Price and Moses Haas. Indictment. Conspiracy to commit an offense against the United States. U. S. Rev. St. Secs. 5440 and 5451. Henry L. Stimson, United States Attorney. A true bill. John E. Holahan, Foreman. (Seal.) U. S. Circuit Court Southern District of New York. Filed May 29, 1908. John A. Shields, Clerk.

122 *Cotton Crop Report.*

1904.

UNITED STATES DEPARTMENT OF AGRICULTURE,
BUREAU OF STATISTICS,
WASHINGTON, D. C., *June* 4, 1904, 10:30 A. M.

The Chief of the Bureau of Statistics of the Department of Agriculture estimates the total area planted in cotton in the United States this season at 31,730,371 acres, an increase of 2,823,046 acres, or 9.8 per cent upon the acreage planted last year.

The average condition of the growing crop on May 26 was 83, as compared with 74.1 on May 26, 1903, 95.1 at the corresponding date in 1902, and a ten-year average of 85.8.

The percentage of increase in acreage in the different States (the comparison being with the area planted last season) is as follows:

Virginia	19.0	Louisiana	13.5
North Carolina	13.5	Texas	7.1
South Carolina	9.0	Arkansas	9.3
Georgia	7.7	Tennessee	11.5
Florida	10.7	Missouri	23.0
Alabama	9.0	Oklahoma	29.2
Mississippi	10.5	Indian Territory	26.0

The condition of the crop by States on May 26 was as follows:

Virginia	82	Louisiana	86
North Carolina	84	Texas	84
South Carolina	81	Arkansas	84
Georgia	78	Tennessee	85
Florida	88	Missouri	82
Alabama	80	Oklahoma	93
Mississippi	85	Indian Territory	90

423 Aside from the large increase in acreage, due mainly to the high price of cotton, there are no conditions calling for special comment at this time.

(Signed) JOHN HYDE,
Chief of Bureau.

Approved:
(Signed) JAMES WILSON, *Secretary.*

424 *Opinion of Commissioner.*

After a careful consideration of the testimony offered in this case I am of the opinion that a case of probable cause has been made out against the accused Theodore H. Price on the counts in the complaint and warrant stated except counts four, six and eight which were withdrawn on the examination before me.

Dated New York, March 2, 1909.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

(Endorsed:) In the Circuit Court of the United States, for the Southern District of New York.—Theodore H. Price, Petitioner, against William Henkel, United States Marshal in and for the Southern District of New York, and John A. Shields, United States Commissioner for the Southern District of New York, Respondents.—In the Matter of the Petition of Theodore H. Price for Writs of *Habeas Corpus* and Certiorari.—Part of petition.—Nicoll, Anable, Lindsay & Fuller, 31 Nassau Street, New York City, Attorneys for petitioner.—U. S. Circuit Court, Southern District N. Y. Filed Mar. 2, 1909. John A. Shields, Clerk.

125 United States Circuit Court for the Southern District of New York.

THEODORE H. PRICE, Petitioner,
against
WILLIAM HENKEL, U. S. Marshal, and JOHN A. SHIELDS, U. S. Commissioner for the Southern District of New York.

WARD, *Circuit Judge:*

Habeas Corpus. It is sought to remove the petitioner under Sec. 1014 U. S. Rev. Stat. to the District of Columbia for trial under indictments found there similar to those considered in the case of *Haas v. Henkel* lately decided by me. For the reasons stated in that case I think the Commissioner had probable cause for committing the petitioner and the writ is accordingly discharged and the petitioner remanded.

H. G. WARD, *U. S. C. J.*

Endorsed: Circuit Court of the United States for the Southern District of New York. Theodore H. Price, against William Henkel, U. S. Marshal and John A. Shields, U. S. Commissioner. Opinion, Ward, C. J. U. S. Circuit Court, Southern District of N. Y. Filed Mar. 4, 1909. John A. Shields, Clerk.

126 At a Stated Term of the United States Circuit Court for the Southern District of New York, in the Second Circuit, held at the United States Court House and Postoffice Building in the Borough of Manhattan and City of New York, on the 5th day of March, 1909.

Present: Hon. Henry G. Ward, Circuit Judge.

THEODORE H. PRICE, Petitioner,
against
WILLIAM HENKEL, United States Marshal in and for the Southern District of New York, and JOHN A. SHIELDS, United States Commissioner for the Southern District of New York,

A writ of *habeas corpus* having been issued herein on the 2nd day of March, 1909, upon a petition filed herein on the said 2nd day of March, 1909, directed to William Henkel, Marshal, of the United States, for the Southern District of New York, as the person having the custody of the above named Theodore H. Price, commanding the said William Henkel as said Marshal to produce the body of the said Theodore H. Price before the said United States Circuit Court for the Southern District of New York, at a term thereof to be held at the United States Court House and Postoffice Building, Borough of Manhattan, in the City of New York and said Southern District of New York, on the 2nd day of March, 1909, and the said Theodore H. Price having been produced at that time before the said Court by the said William Henkel, and a return to the said writ of *habeas corpus*

having been made and filed by the said William Henkel
127 as United States Marshal as aforesaid, and a traverse having been filed to said return by said Theodore H. Price; and a writ of certiorari having been issued herein upon said 2nd day of March, 1909, directed to John A. Shields, United States Commissioner for the Southern District of New York, commanding him to certify to said Circuit Court on said 2nd day of March, 1909, the record of the proceedings had before him in the matter of the removal of Theodore H. Price to the District of Columbia, and said John A. Shields as United States Commissioner for the Southern District of New York having made a return to said writ of certiorari on said 2nd day of March, 1909; and said writ of *habeas corpus*, and said return, and said traverse to said return having come on for hearing on the 4th day of March, 1909, and argument having been made thereon by Howard S. Gans, Esquire, of counsel for the petitioner in support of said writs, and by Goldthwaite H. Dorr, Esquire, Assistant United States Attorney, in opposition thereto.

Now, on reading and filing said writ of *habeas corpus* and said writ of certiorari, and said petition of said Theodore H. Price, and said return of said William Henkel to said writ of *habeas corpus*, and the said traverse to said return by said Theodore H. Price, and the said return by said John A. Shields to said writ of certiorari, and due deliberation having been had thereon, and on motion of Henry L. Stimson, United States Attorney for the Southern District of New York, it is

Ordered, that said motion on said writ of *habeas corpus* to discharge the said Theodore H. Price be and it hereby is, in all respects
denied, and that said Theodore H. Price be and he hereby is
128 remanded to the custody and control of said William Henkel, United States Marshal for the Southern District of New York, and that said writs of *habeas corpus* and certiorari be and they hereby are discharged.

Enter.

H. G. WARD,
U. S. C. C. J.

(Endorsed:) Circuit Court of the United States, Southern Dist. of New York.—Theodore H. Price, Petitioner, against William Henkel, United States Marshal for the Southern District of New York and John A. Shields, United States Commissioner for the Southern District of New York.—Order discharging writ of *habeas corpus*, etc.—Nicoll, Anable, Lindsay & Fuller, Attorneys for Petitioner, 31 Nassau Street, New York.—Copy received. March 5 '09. Henry L. Stimson, U. S. Att'y.—U. S. Circuit Court, Southern District N. Y., Filed Mar. 5, 1909, John A. Shields, Clerk.

429 In the Circuit Court of the United States for the Southern District of New York.

THEODORE H. PRICE, Petitioner, Appellant,
against
WILLIAM HENKEL, United States Marshal in and for the Southern District of New York, and JOHN A. SHIELDS, United States Commissioner for the Southern District of New York.

In the Matter of the Petition of THEODORE H. PRICE for Writs of *Habeas Corpus* and Certiorari.

The petition of the above named petitioner for an order allowing an appeal to the Supreme Court of the United States from the final order hereinbefore entered in this action, respectfully shows:

1. That the petitioner and appellant above named is a resident of the City of New York, in the Southern District of New York, United States of America, and was such resident at all of the times hereinafter mentioned.

2. The petitioner and appellant above named, feeling himself aggrieved by the final order heretofore made and entered by this court on the 5th day of March, 1909, whereby it was ordered that the application for a writ of *habeas corpus*, directed to William Henkel, United States Marshal in and for the Southern District of New York, requiring said marshal to bring and have your petitioner before this court, and that his application for a writ of certiorari, directed to the Honorable John A. Shields, United States Commissioner for the Southern District of New York, commanding him to return
430 all proceedings against your petitioner to the said Circuit Court for the Southern District of New York forthwith for such action as might be proper in the premises, being denied, your petitioner's writ of *habeas corpus* discharged and your petitioner remanded; now comes, by Nicoll, Anable, Lindsay & Fuller, his solicitors and counsel, and petitions the Court for an order allowing him to prosecute an appeal from said final order to the Supreme Court of the United States, under and according to the laws of the United States in that behalf made.

3. Your petitioner is advised by counsel that there are grave doubts as to whether the proceedings referred to in the petition have not infringed the constitutional rights of your petitioner, and whether the commitment of your petitioner and the restraint of his person referred to in said petition are not without authority of law, and whether the said United States Commissioner, before whom your petitioner was arraigned, as set forth in said petition, had jurisdiction either to require bail of your petitioner or to commit your petitioner in default thereof, and is further advised by his said counsel that they are of the opinion that your petitioner's constitutional rights have been infringed by the said proceedings and that his detention under and by virtue of the said commitment issued by the said Commissioner, as referred to in the said petition and the denial of

his discharge upon said writs of *habeas corpus* and certiorari in violation of his rights under the Constitution of the United States, and your petitioner desires in good faith to submit the constitutional questions, and such other questions as are pertinent thereto, or involved therein, to the Supreme Court of the United States for their determination.

431 And for the leave asked herein your petitioner will ever pray, etc.

Dated New York, March 5th, 1909.

THEODORE H. PRICE,
Petitioner.

NICOLL, ANABLE, LINDSAY & FULLER,
Attorneys for Petitioner.

Office and P. O. Address, 31 Nassau Street, Borough of Manhattan, City of New York.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Theodore H. Price, being duly sworn, says that he is the petitioner above named; that the foregoing petition of his own knowledge is true, except as to the matters therein stated to be alleged on information and belief, and that as to those matters, he believes it to be true.

THEODORE H. PRICE.

Subscribed and sworn to before me this 5th day of March, 1909.

H. G. WARD,
U. S. C. C. J.

The foregoing petition on appeal is granted and it is

Ordered, that pending the determination of said appeal and until the further order of this court after decision thereon, all proceedings herein and all proceedings for the removal of said Theodore H. Price to the District of Columbia, under and by virtue of the indictments referred to in the petition for a writ of *habeas corpus* herein,

432 be and they are hereby stayed.

Further ordered, that pending said appeal, said defendant, Theodore H. Price, be released on bail to await the decision and determination of said appeal.

Supersedeas bond fixed at Five Thousand Dollars ($5,000.00).

Taken in open court this 5th day of March, 1909.

H. G. WARD,
Circuit Court Judge.

Endorsed: Circuit Court of the United States, Southern District of New York. Theodore H. Price, Petitioner against William Henkel, United States Marshal for the Southern District of New York, and John A. Shields, United States Commissioner for the Southern District of New York. Petition for order allowing appeal with order annexed allowing same and staying proceedings. Nicoll, Anable, Lindsay & Fuller, Attorneys for Petitioner, 31 Nassau

Street, New York.—Copy Rec'd March 5/09.—Henry L. Stimson, U. S. Atty. U. S. Circuit Court, Southern District of N. Y., Filed Mar. 4, 1909. John A. Shields, Clerk.

433 In the Supreme Court of the United States.

THEODORE H. PRICE, Petitioner,
vs.
WILLIAM HENKEL, United States Marshal in and for the Southern District of New York, and JOHN A. SHIELDS, United States Commissioner for the Southern District of New York.

In the Matter of the Petition of THEODORE H. PRICE for Writs of *Habeas Corpus* and Certiorari.

Comes now the petitioner, Theodore H. Price, and files the following Assignment of Errors upon which he will rely upon his prosecution of the appeal from the final order made in the Circuit Court of the United States for the Southern District of New York on the 5th day of March 1909, in the above entitled cause; dismissing the writs of *habeas corpus* and certiorari and remanding your petitioner:

1. That the said Court erred in holding that the alleged indictments in the said record contained, or either of them, set forth a crime or offense against the laws of the United States.

2. That the said court erred in holding and deciding that any of the counts of either of the indictments charged a conspiracy to defraud the United States within the meaning of Section 5440 of the Revised Statutes.

3. That the said court erred in holding and deciding that any of the counts of either of the indictments charged a conspiracy to commit the offense against the United States defined by Section 5451 of the Revised Statutes.

4. That the said court erred in holding that any of the indictments charged the offense of bribery.

434 5. That the said court erred in holding that any of the indictments charged the offense of conspiring to promise, offer and give to an officer of the United States and a person acting for and in behalf of the United States in an official function, under and by virtue of a certain department and office of the government, a sum of money to induce him to do acts in violation of his lawful duty.

6. That the said court erred in holding that the said alleged indictments, or either of them, were properly admitted in evidence before the Honorable Commissioner to prove that there was probable cause to believe that your petitioner was guilty of a crime or offense against the laws of the United States.

7. That the said Court erred in declining to hold and decide that the said Commissioner was without jurisdiction to commit your petitioner for removal to the District of Columbia, for the reason that said petitioner was under indictment in the Southern District

of New York for the same offenses charged against him by the indictments found in the District of Columbia, as disclosed by the record herein; it appearing that your petitioner had been arraigned upon said New York indictments and had been admitted to bail.

8. That the said Court erred in declining to hold and decide that the alleged crimes set forth in the indictments found in the District of Columbia are, and each of them is, barred by the Statute of Limitations.

9. That the said Court erred in declining to hold and decide that Holmes was not an officer of the United States within the
435 meaning of that term, as used in Section 5451 and all the other sections of the Revised Statutes of the United States pertinent to the charges attempted to be set forth.

10. That the said court erred in holding that the sufficiency of the indictments is to be determined by the court in which they were found, to wit, the Supreme Court of the District of Columbia, and is not a matter of inquiry in removal proceedings.

11. That the said court erred in declining to hold and decide that the indictments relating to Section 5451 of the Revised Statutes do not sufficiently charge the violation of that section, or a conspiracy to violate it.

12. That the court erred in declining to hold and decide that the alleged crime of conspiracy to bribe did not merge in the completed offense.

13. That the said court erred in declining to hold and decide that no count of any of the indictments sufficiently charges any offense against the United States, and that the said indictments and the other evidence before the Commissioner was insufficient to vest the Commissioner with jurisdiction to commit your petitioner for removal, or to order his detention.

14. That the said court erred in declining to hold and decide that the preliminary complaint, upon which the warrant was issued against your petitioner, was insufficient, it appearing that the same was upon information and belief, and not upon the positive knowledge of the affiant; and also that a bench warrant from the District of Columbia was not filed with the said complaint at the time that said warrant was issued.

436 15. That the said court erred in refusing and failing to decide that the refusal of the said Commissioner to receive the evidence of the witnesses Lanning, Parker, Bailsir, Murray, Van Riper, Smith, Springs, Olmstead, Coates, and Mayer, offered by the petitioner in his behalf, constituted a denial of due process of law and deprived the Commissioner of power or jurisdiction to make any order in the premises for the detention of your petitioner.

16. That the said court erred in declining to hold and decide that no one of the papers admitted in evidence as indictments had any legal inception.

17. That the said court erred in dismissing the petitioner's writs of *habeas corpus* and certiorari and in remanding him to the custody of the marshal.

18. That the said court erred in refusing the discharge of said petitioner.

19. That the said court erred in holding that the restraint of the petitioner's liberty is legal.

20. That the said court erred in holding that the restraint of the petitioner is not a violation of his constitutional rights, under the Constitution of the United States.

21. That the court erred in failing to hold that there was no evidence before the Commissioner to establish that your petitioner was the person named in the said indictments or either of them.

22. That the court erred in failing to hold that it had been conclusively established that your petitioner had not committed
437 any offense against the United States or any crime triable in the District of Columbia.

23. That the said court erred in holding and deciding that any one of the papers admitted in evidence as indictments was proved to be a valid or legal indictment, and that any one of the said papers furnished any evidence of probable cause to believe the petitioner guilty of a crime, or was admissible in evidence in the proceeding.

24. That the said court erred in not holding and deciding that your petitioner is unlawfully restrained of his liberty.

25. That the said court erred in not holding and deciding that your petitioner is deprived of his liberty without due process of law within the meaning of the Fifth Amendment to the Constitution of the United States.

26. That the said court erred in holding that the commitment issued by the said Commissioner was not without legal authority or jurisdiction of any kind, and was not utterly void and ineffectual, and that the petitioner's detention and imprisonment thereunder was not in violation of the Constitution of the United States and in violation of his privileges and immunities thereunder.

27. That the said Court erred in declining to hold and decide that your petitioner's detention was in violation of Article V of the Amendments to the Constitution of the United States, in that the said United States Commissioner had no jurisdiction to order the arrest and commitment of your petitioner, and in that your petitioner is held to answer for a crime without any sufficient or valid indictment of a grand jury.

438 28. That the said court erred in declining to hold and decide that the restraint of your petitioner is in violation of Article IV of the Amendments to the Constitution of the United States, because it appears from the indictment upon which the warrant in this case was issued that it was wholly void.

29. That the said court erred in failing to hold and decide that the restraint of your petitioner is in violation of the provisions of Article VI of the Amendments to the Constitution of the United States, for the reason that upon the proof before the Commissioner and before the said Court, it was shown that the offenses charged in the indictment were not committed in the District of Columbia.

31. That the said Court committed other errors appearing on the record.

Wherefore, your petitioner prays that the order dismissing the said writs of *habeas corpus* and certiorari and remanding your peti-

tioner to the custody of the United States marshal be reversed and that your petitioner be discharged from custody.

THEODORE H. PRICE,
Petitioner.

NICOLL, ANABLE, LINDSAY & FULLER,
Attorneys for Petitioner.

439 Endorsed: Circuit Court of the United States, Southern District of New York. Theodore H. Price, Petitioner against William Henkel, United States Marshal for the Southern District of New York, and John A. Shields, United States Commissioner for the Southern District of New York. Assignment of errors. Nicoll, Anable, Lindsay & Fuller, Attorneys for Petitioner, 31 Nassau Street, New York.—U. S. Circuit Court, Southern District of N. Y. Filed Mar. 4, 1909, John A. Shields, Clerk.

440 *Bond on Appeal.*

In the Supreme Court of the United States.

UNITED STATES
against
THEODORE H. PRICE.

UNITED STATES OF AMERICA,
Southern District of New York:

Be it remembered, that on the 5th day of March, 1909, before me, John A. Shields, one of the Commissioners of the District Court of the United States for the Southern District of New York, personally came Theodore H. Price, as principal, and the Fidelity and Deposit Company of Maryland as surety, and severally acknowledged themselves to owe to the United States of America, that is to say, the said Theodore H. Price, the sum of five thousand dollars ($5000), and the said Fidelity and Deposit Company of Maryland the sum of five thousand dollars ($5000), separately to be levied and made on their respective goods, chattels, lands and tenements, to the United States, if default shall be made in the condition following, to wit:

Whereas, the said Theodore H. Price was detained in the custody of William Henkel as United States Marshal for the Southern District of New York, under a Commitment issued by the Honorable John A. Shields, Commissioner for the Southern District of New York, in a proceeding to secure the removal of the said Theodore H. Price to the District of Columbia on the 2nd day of March, 1909; and

Whereas, the said Theodore H. Price made an application to the United States Circuit Court, before Honorable Henry G. Ward on the 2nd day of March, 1909, for a writ of *habeas corpus*, directed to said William Henkel, United States Marshal in and for the South-

441 ern District of New York, requiring said Marshal to bring and have said Theodore H. Price before said Court, together with the true cause of his detention; and

Whereas, the said Theodore H. Price made an application to the United States Circuit Court, before Honorable Henry G. Ward, Judge, on the 2nd day of March, 1909, for a writ of certiorari, directed to the Honorable John A. Shields, United States Commissioner for the Southern District of New York, in aid of the said writ of *habeas corpus*, commanding that he return all proceedings against your petitioner to the Circuit Court forthwith, for such action as might be proper in the premises; and

Whereas, on the 5th day of March, 1909, the said Court did make its final order, dismissing said writ of *habeas corpus* and certiorari, and remanding said Theodore H. Price; and

Whereas, the said Theodore H. Price has appealed from the said final order to the Supreme Court of the United States; and

Whereas, the said Honorable Henry G. Ward, United States Circuit Judge, has duly allowed said appeal, and has ordered that, pending said appeal, said Theodore H. Price be released on bail, and has fixed the amount of the same at Five thousand dollars ($5000); and

Whereas, it is ordered that said Theodore H. Price be enlarged upon bail in the sum of Five thousand Dollars ($5000) for his appearance to answer the exigency and determination of said appeal and to personally abide the final decision and determination of the said Supreme Court of the United States in that behalf;

Now, therefore, the condition of this obligation is such, that if the said Theodore H. Price shall duly appear in the United States Circuit Court for the Southern District of New York, to answer the exigency and determination of said appeal, and personally abide the final decision and determination of the said Supreme Court of the United States and of said Circuit Court of the United States, upon the mandate of the said Supreme Court of the United States, and obey and abide the said orders of the said Circuit Court of the United States, and not depart without leave upon the conditions aforesaid, and upon the entry of said orders upon said appeal, then this recognizance to be void, otherwise to remain in full force and virtue.

THEODORE H. PRICE. [SEAL.]
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By CHARLES V. R. MARSH, *Attorney-in-Fact.*

Attest:
[SEAL.] JAMES R. KINGSLEY, *Attorney.*

Taken and acknowledged before me the day and year first above written.

JOHN A. SHIELDS,
United States Commissioner.

Recognizance approved as to form and sufficiency.

H. G. WARD,
United States Circuit Judge.

Dated March 5th, 1909.

443 STATE OF NEW YORK,
County of New York, ss:

On the Fifth day of March, in the year 1909, before me personally came Charles V. R. Marsh, to me known, who, being by me duly sworn, did depose and say, that he resides in the City of New York; that he is the Attorney-in-fact of the Fidelity and Deposit Company of Maryland, the corporation described in, and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the Fidelity and Deposit Company of Maryland has been duly authorized to transact business in the State of New York in pursuance of the statutes in such case made and provided; and that the liabilities of said Company do not exceed its assets as ascertained in the manner provided in Section 3, of Chapter 720, of the Session Laws of the State of New York, for the year 1893. And the said Charles V. R. Marsh further said that he is acquainted with James R. Kingsley and knew him to be Attorney of said Company; that the signature of the said James R. Kingsley subscribed to the within instrument, was in the genuine handwriting of the said James R. Kingsley and was subscribed thereto by like order of the Board of Directors, and in the presence of him, the said Charles V. R. Marsh.

[SEAL.] FRANCIS P. FOLEY,
Notary Public, New York County.

At a regular and lawful meeting of the Board of Directors of the Fidelity and Deposit Company of Maryland, at which a quorum was present, held at the office of the Company in the City of Baltimore, State of Maryland, on the third day of June, A. D., 1908, on motion, it was unanimously adopted, to wit:

"*Resolved*, That Henry B. Platt, Vice-President, or James R. " Kingsley, Attorney, or Frank H. Platt, Edward T. Platt, Joseph A. " Flynn, Hugh M. Allwood, and Charles V. R. Marsh, Attorneys- " in-Fact of this Company, in the State of New York, be, and each " of them is, hereby authorized and empowered to execute and de- " liver any and all bonds or undertakings for or on behalf of this " Company, in its business of guaranteeing the fidelity of persons " holding places of public or private trust and the performance of " contracts other than insurance policies, and executing or guaran- " teeing bonds and other undertakings required or permitted in all " actions or proceedings or by law required, and to attach thereto the " seal of the Company, the same to be attested by the said James R. " Kingsley, Attorney of the Company, or by either one of the other " persons above named, as occasion may require."

COUNTY OF NEW YORK, *ss:*

I, James R. Kingsley, Attorney, of the Fidelity and Deposit Company of Maryland, have compared the foregoing Resolution with the original thereof, as recorded in the Minute Book of said Company,

and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of the said original Resolution. Given under my hand and the seal of the Company, at the City of New York, this 5th day of March, 1909.

[SEAL.] JAMES R. KINGSLEY,
Attorney.

Fidelity and Deposit Company of Maryland.

Statement, December 31, 1908.

Resources.		Liabilities.	
Real Estate	$757,000 00	Capital stock	$2,000,000 00
Stocks and Municipal Bonds	2,844,559 00	Surplus	2,550,505 83
Government and Railroad Bonds	1,456,500 00	Premium Reserve	911,584 15
British Consols	224,430 00	Reserve for Taxes on Premiums Payable in 1909	55,000 00
Net Premiums Due	168,934 96	Reserve for Contingent Claims	624,647 05
Advanced on Contracts (Secured)	83,529 22	Reserve for Claims Adjusted (checks out)	2,479 83
Cash in Bank, etc.	575,463 68		
Total	$6,110,216 86	Total	$6,110,216 86

STATE OF NEW YORK,
County of New York, ss:

James R. Kingsley, being duly sworn, says that he is the Attorney of the Fidelity and Deposit Company of Maryland; that the foregoing is a true and correct statement of the financial condition of said Company, as of December 31, 1908, to the best of his knowledge and belief, and that the financial condition of said Company is as favorable now as it was when such statement was made.

JAMES R. KINGSLEY.

Subscribed and sworn to before me, this 5th day of March, 1909.

[SEAL.] FRANCIS P. FOLEY,
Notary Public, New York County.

144 (Endorsed:) Supreme Court of the U. S.—United States *vs.* Theodore H. Price.—Bond on Appeal.—U. S. Circuit Court, Southern District N. Y., Filed Mar. 5, 1909, John A. Shields, Clerk.

445 In the Supreme Court of the United States.

THEODORE H. PRICE, Petitioner-Appellant,
against
WILLIAM HENKEL, United States Marshal, in and for the Southern District of New York, and JOHN A. SHIELDS, United States Commissioner for the Southern District of New York.

In the Matter of the Petition of THEODORE H. PRICE for Writs of *Habeas Corpus* and Certiorari.

Know all men by these presents, That we, Theodore H. Price as principal, and the Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto the United States of America for the full and just sum of two hundred and fifty dollars ($250), to be paid to the said United States, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 5th day of March, 1909.

Whereas, lately, to wit, on the 5th day of March, 1909, at a Circuit Court of the United States, in and for the Southern District of New York, in a proceeding therein pending, an order was entered dismissing writs of *habeas corpus* and certiorari procured by the above named petitioner, Theodore H. Price;

And the said petitioner has duly obtained an appeal from the said order, to the Supreme Court of the United States, and has filed a copy thereof in the Clerk's Office of the said Circuit Court reviewing the same;

Now, the condition of the above obligation is such that if the said petitioner, Theodore H. Price, shall prosecute said appeal to effect, and shall answer all costs if he shall fail to make the said appeal good, then this obligation to be void, otherwise to re-
446 main in full force and effect.

THEODORE H. PRICE. [SEAL.]
FIDELITY AND DEPOSIT COMPANY OF MARYLAND.
By CHARLES V. R. MARSH,
Attorney in Fact.

Attest:
[SEAL.] JAMES R. KINGSLEY, *Attorney.*

Sealed and delivered and taken and acknowledged this 5th day of March, 1909, before me.

JOHN A. SHIELDS,
United States Commissioner for the Southern District of New York.

Approved as to form, amount and sufficiency.

H. G. WARD,
United States Circuit Judge.

117 STATE OF NEW YORK,
County of New York, ss:

On the Fifth day of March, in the year 1909, before me personally came Charles V. R. Marsh, to me known, who, being by me duly sworn, did depose and say, that he resides in the City of New York; that he is the Attorney-in-fact of the Fidelity and Deposit Company of Maryland, the corporation described in, and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the Fidelity and Deposit Company of Maryland has been duly authorized to transact business in the State of New York in pursuance of the statutes in such case made and provided; and that the liabilities of said Company do not exceed its assets as ascertained in the manner provided in Section 3, of Chapter 720, of the Session Laws of the State of New York, for the year 1893. And the said Charles V. R. Marsh further said that he is acquainted with James R. Kingsley and knew him to be Attorney of said Company; that the signature of the said James R. Kingsley subscribed to the within instrument, was in the genuine handwriting of the said James R. Kingsley and was subscribed thereto by like order of the Board of Directors, and in the presence of him, the said Charles V. R. Marsh.

[SEAL.] FRANCIS P. FOLEY,
Notary Public, New York County.

At a regular and lawful meeting of the Board of Directors of the Fidelity and Deposit Company of Maryland, at which a quorum was present, held at the office of the Company in the City of Baltimore, State of Maryland, on the third day of June, A. D. 1908, on motion, it was unanimously adopted, to wit

"*Resolved*, That Henry B. Platt, Vice-President, or James R. "Kingsley, Attorney, or Frank H. Platt, Edward T. Platt, Joseph "A. Flynn, Hugh H. Allwood, and Charles V. R. Marsh, Attorneys-"in-Fact of this Company, in the State of New York, be, and each "of them is, hereby authorized and empowered to execute and de-"liver any and all bonds or undertakings for or on behalf of this "Company, in its business of guaranteeing the fidelity of persons "holding places of public or private trust and the performance of "contracts other than insurance policies, and executing or guaran-"teeing bonds and other undertakings required or permitted in all "actions or proceedings or by law required, and to attach thereto the "seal of the Company, the same to be attested by the said James R. "Kingsley, Attorney of the Company, or by either one of the other "persons above named, as occasion may require."

COUNTY OF NEW YORK, *ss:*

I, James R. Kingsley, Attorney, of the Fidelity and Deposit Company of Maryland, have compared the foregoing Resolution with the original thereof, as recorded in the Minute Book of said Com-

pany, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of the said original Resolution. Given under my hand and the seal of the Company, at the City of New York, this 5th day of March, 1909.

[SEAL.] JAMES R. KINGSLEY, *Attorney.*

Fidelity and Deposit Company of Maryland.

Statement, December 31, 1908.

Resources.		Liabilities.	
Real Estate	$757,000 00	Capital Stock	$2,000,000 00
Stocks and Municipal Bonds	2,844,359 00	Surplus	2,536,505 83
Government and Railroad Bonds	1,456,500 00	Premium Reserve	911,584 15
British Consols	224,450 00	Reserve for Taxes on Premiums (Payable in 1909)	35,000 00
Net Premiums Due	168,934 96	Reserve for Contingent Claims	624,647 05
Advanced on Contracts (Secured)	83,529 22	Reserve for Claims Adjusted (checks out)	2,479 83
Cash in Bank, etc.	575,463 68		
Total	$6,110,216 86	Total	$6,110,216 86

STATE OF NEW YORK,
County of New York, ss:

James R. Kingsley, being duly sworn, says that he is the Attorney of the Fidelity and Trust Company of Maryland; that the foregoing is a true and correct statement of the financial condition of said Company, as of December 31, 1908, to the best of his knowledge and belief, and that the financial condition of said Company is as favorable now as it was when such statement was made.

JAMES R. KINGSLEY.

Subscribed and sworn to before me, this 5th day of March, 1909.

[SEAL.] FRANCIS P. FOLEY,
Notary Public, New York County.

118 (Endorsed:) Supreme Court of the U. S.—Theodore H. Price, Petitioner-Appellant, against William Henkel, United States Marshal, etc. Respondents.—Bond.—U. S. Circuit Court, Southern District N. Y. Filed Mar. 5, 1909. John A. Shields, Clerk.

449 In the Supreme Court of the United States.

THEODORE H. PRICE, Petitioner,
against
WILLIAM HENKEL, United States Marshal in and for the Southern District of New York, and JOHN A. SHIELDS, United States Commissioner for the Southern District of New York.

In the Matter of the Petition of THEODORE H. PRICE for Writs of *Habeas Corpus* and Certiorari.

UNITED STATES OF AMERICA, *ss.:*

The President of the United States to the Honorable Henry L. Stimson, United States District Attorney for the Southern District of New York; John A. Shields, Clerk of the United States Circuit Court for the Southern District of New York; William Henkel, United States Marshal in and for the Southern District of New York, and John A. Shields, Esquire, United States Commissioner for the Southern District of New York:

You and each of you are hereby cited and admonished to be at the Supreme Court of the United States at the City of Washington, within thirty days from the date of this writ, pursuant to the appeal duly allowed by the United States Circuit Court for the Southern District of New York, and filed in the Clerk's office of said court on the 5th day of March, 1909, in a certain case entitled "In the matter of the Petition of Theodore H. Price for Writs of *Habeas Corpus* and Certiorari; Theodore H. Price, Petitioner-Appellant, against
450 William Henkel, United States Marshal in and for the Southern District of New York and John A. Shields, United States Commissioner for the Southern District of New York," to show cause, if any, why the final order of the said Circuit Court rendered against the said Appellant as in said Appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that respect.

Witness the Honorable Henry G. Ward, Judge of the Circuit Court of the United States, this 5th day of March, 1909.

HENRY G. WARD,
Justice of the Circuit Court of the United States.

451 [Endorsed:] 2 H. E. & O. C. 2878. In the Supreme Court of the United States. Theodore H. Price, Petitioner-Appellant, against William Henkel, United States Marshal in and for the Southern District of New York, and John A. Shields, United States Commissioner for the Southern District of New York. Citation on appeal. Nicoll, Anable, Lindsay & Fuller, Attorneys for Petitioner, 31 Nassau street, New York. Copy Rec'd March 5 09. Henry L. Stimson, U. S. Att'y. U. S. Circuit Court, Southern District, N. Y. Filed Mar. 5, 1909. John A. Shields, Clerk.

452 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby Certify that the foregoing pages, numbered from one to 451 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the cause entitled Theodore H. Price, Petitioner-Appellant, *against* William Henkel, United States Marshal in and for the Southern District of New York, and John A. Shields, United States Commissioner for the Southern District of New York, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 10 day of March in the year of our Lord One Thousand Nine Hundred and nine, and of the Independence of the said United States the One Hundred and Thirty-third.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

[Endorsed:] United States Circuit Court of Appeals for the Second Circuit. Theodore H. Price, Petitioner-Appellant, *vs.* William Henkel, U. S. Marshal, S. D. N. Y., &c. Transcript of Record from the Circuit Court of the United States for the Southern District of New York.

Endorsed on cover: File No. 21,551. S. New York. C. C. U. S. Term No. 385. Theodore H. Price, appellant, *vs.* William Henkel, United States Marshal for the Southern District of New York, *et al.* Filed March 15th, 1909. File No. 21,551.

Office Supreme Court, U. S.
FILED.
APR 12 1909
JAMES H. McKENNEY,
CLERK.

No. 385.

In the Supreme Court of the United States,

OCTOBER TERM, 1908.

THEODORE H. PRICE, *Appellant*,

vs.

WILLIAM HENKEL, UNITED STATES MARSHAL, ETC., ET AL.

On Appeal from the Circuit Court of the United States for the Southern District of New York.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THEODORE H. PRICE, Appellant, v. WILLIAM HENKEL, United States Marshal, &c., *et al.*	No. 755.

MOTION TO ADVANCE.

This is an appeal from an order of the Circuit Court of the United States for the Southern District of New York, discharging writs of *habeas corpus* and *certiorari* and remanding the relator to custody to await removal to the District of Columbia for trial upon two indictments pending against him there.

These indictments were found May 29, 1908, and are two of those concerned in the appeals of Frederick A. Peckham and Moses Haas (Nos. 727 and 728), which have been advanced on motion of the Solicitor General, and assigned for argument on October 12, 1909, after the causes previously assigned for that day.

One of the indictments against the appellant charges him with having, on May 31, 1905, at the District of Columbia, entered into a conspiracy with Haas and Peckham, whereby the associate statistician of the Bureau of Statistics in the Department of Agriculture was to divulge, to the defendants, in advance of their official issue, the contents of the Government cotton crop reports.

This indictment contains eight counts, in some of which a further purpose to render the reports inaccurate is alleged. The theory of this indictment is that the acts alleged constitute a conspiracy to defraud the United States and to commit a crime against the United States.

The other indictment charges the defendant with having on the same day, viz., May 31, 1905, at the District of Columbia, entered into a conspiracy with Haas to bribe the associate statistician to violate his duty by prematurely disclosing the contents of the reports, and by rendering the same inaccurate.

On the day these Washington indictments were found, two similar indictments containing substantially the same allegations, the *venue* however being laid in the Southern District of New York, were returned against the appellant in the Circuit Court for the latter District. The proceedings for the removal of Messrs. Price, Haas and Peckham to the District of Columbia were instituted with the consent of that Court against the appellant's objection.

Reference to the record herein will show that a number of questions are involved which are practically identical with those presented in the Haas and Peckham cases. The principal question raised in all three cases is whether the indictments charge substantially a crime against the United States. Although important questions are presented in No. 755, other than those raised by counsel for Messrs. Haas and Peckham, the character and history of the cases indicate sufficiently the desirability that all of them should be heard at the same time.

The appellant, therefore, moves the Court to advance No. 755, and set it down for hearing immediately after the conclusion of the argument in No. 728.

THOMAS S. FULLER,
Counsel for the Appellant.

April 12, 1909.

4

Office Supreme Court, U.
FILED.
DEC 30 1909
JAMES H. McKENNEY

No. 385.

Supreme Court of the United States.

OCTOBER TERM, 1909.

THEODORE H. PRICE, APPELLANT,

v.

WILLIAM HENKEL, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF AND ARGUMENT FOR THE APPELLANT.

DE LANCEY NICOLL,
JOHN D. LINDSAY,
HOWARD S. GANS,
THOMAS STAPLES FULLER,
Of Counsel.

INDEX.

PAGE

Preliminary statement 1

Brief on the facts 2

Errors relied on 23

Argument:

FIRST. Section 1014 does not authorize removal from the district in which a federal offense is actually committed, when the accused has been already held for trial for the same offense before a court of competent jurisdiction in that district 24

SECOND. There was no evidence before the Commissioner of probable cause to believe that the defendant had committed any crime in the District of Columbia 56

THIRD. None of the counts of either of the Washington indictments substantially charges the defendant with an offense against the United States 63

(a) The conspiracy set forth in indictment 26,088 is not a conspiracy to defraud the United States 73

(b) It is not charged that the disclosures were to be made to unauthorized persons 86

(c) It appears affirmatively that Holmes was authorized to make the disclosures 108

PAGE

(d) It is not charged that the report should be rendered inaccurate through any wrongdoing or dishonesty 111

(e) The conspiracy set forth in indictment 26,089 does not set forth any acts which were violative of duty 116

(f) The acts which it is charged that Holmes was to be bribed to do were not acts to be done in his official capacity 118

Supreme Court of the United States.

OCTOBER TERM, 1909.

THEODORE H. PRICE, Appellant, AGAINST WILLIAM HENKEL, United States Marshal for the Southern District of New York, *et al.*	No. 385.

BRIEF FOR THE APPELLANT.

This is an appeal from an order of the Circuit Court for the Southern District of New York, entered the 5th day of March, 1909, discharging writs of *habeas corpus* and *certiorari* sued out by the appellant, a citizen and resident of the State of New York, to determine the legality of his detention under a commitment issued by John A. Shields, United States Commissioner, whereby he was committed to await the issuance of a warrant for his removal to the District of Columbia for trial upon certain indictments pending in the Supreme Court of that district.

The questions raised by the writs were, among others, (1) the right of the Government under Section 1014 of the Revised Statutes to remove a person ac-

cused of a federal offense from a district of which he is a resident, in which he was present at the time when his offense is alleged to have been committed, and in which he has been held for trial in a court which, concededly, has cognizance of the offense, for trial in another district, because this course will better suit the convenience of the Government; (2) the sufficiency of the evidence before the Commissioner to justify the issuance of the commitment; and (3) whether the appellant was substantially charged with an offense against the United States in the District of Columbia.

The facts adduced before the Commissioner and the proceedings had prior to the issuance of the writs were as follows:

BRIEF ON THE FACTS.

On the 29th day of May, 1908, the Grand Jury of the Southern District of New York filed two indictments against the appellant, based on Section 5440 of the Revised Statutes, embodying charges of conspiracy to defraud the United States, and conspiracy to commit an offense in violation of Section 5451.

In one of the indictments (No. 307) the appellant was charged with having entered into a conspiracy with Moses Haas, Edwin S. Holmes, Jr., and other unknown persons, to defraud the United States, whereby Holmes, who was Associate, and at times acting, statistician of the Bureau of Statistics of the Department of Agriculture, was, in violation of his duty

(1) to furnish Price and Haas with advance information as to the contents of the June, 1905, cotton

crop report, for the pecuniary benefit of the conspirators "in speculating in cotton" (Exhibit O, 1st count, p. 175);

(2) to furnish advance information as to the contents of "each of said cotton crop reports" thereafter to be issued (*Id.*, 2d count, pp. 180–1); and

(3) to cause and procure the June, 1905, report to be untrue and inaccurate, as well as to furnish advance information as to its contents (*Id.*, 3rd count, p. 183).

The other indictment (No. 308), charged the appellant with having conspired with Haas to promise, offer and give Holmes a sum of money, to an amount unknown, to induce the latter to violate his duty,

(1) by furnishing advance information as to the June, 1905, report (Exhibit P, 1st count, pp. 189-190), and

(2) by causing that report to be false (*Id.*, 2nd count, pp. 192–3).

Although the two indictments on their face charge different conspiracies, it is conceded that both are based on the same transaction. It is indeed difficult to see what object was to be served by thus splitting up the charge, for, at the most, it cannot be claimed that more than one offense was committed, and all five counts might properly, and indeed under the usual practice would have been, joined in a single indictment.

Since both indictments allege that the conspiracy was formed *at the City of New York, in the Southern District of New York*, it is plain that the Circuit Court

of the United States for that District "has cognizance of the offense."

Revised Statutes, Section 1014.[1]

On the same day that these indictments were returned, two other indictments were filed by the Grand Jury of the District of Columbia, in the Supreme Court of that district, charging the appellant with the same offense, in practically the same language, with the exception that in the District of Columbia indictments the conspiracy is alleged to have been entered into there.

The learned counsel for the Government say that the Washington indictments charge "*two* conspiracies which are nowhere directly or indirectly referred to in any of the New York indictments," namely, (1) a conspiracy whereby "whenever such information should be furnished to Price, he, before the publication of the report, would engage in buying or selling cotton, as the case might be, and, after the report had been finally published, Price would then buy or sell the cotton theretofore handled, thereby making large profits which would be divided among the conspirators," and (2) a conspiracy whereby Price, as soon as the June, 1905, report was published, was to telegraph to the Bureau inquiring whether the report included the acres actually planted up to May 25, or whether it also included the acres which it had estimated were thereafter to be planted, and Holmes was to cause a reply to be sent that the report included only the acreage

[1] This section is printed in full at pp. 46-47, *post*.

planted to May 25 (Brief for the Appellee in No. 367, Point VI, pp. 61–63).

It is quite true that the precise allegations of the fifth and seventh counts of the Washington indictments are not reproduced literally in the New York indictments (*Id.*, p. 62). But the difference is one of form only, and does not affect the substance of the single offense charged in both series of indictments.

If the contemplated premature disclosure would have been a fraud against the United States, so that an agreement to occasion such disclosure constituted a conspiracy to defraud the United States within the meaning of Section 5440, the purpose to which the knowledge thus acquired was to be put is quite immaterial. As to the telegraphic correspondence which the seventh count alleges was a part of the project, since it is not claimed that the reply to be sent from the Bureau was to vary or distort the report in any way, it is difficult to see how the allegations on that subject are of the least importance.

Indeed, the Attorney-General who instituted the proceedings asserted that the *same offense* was charged in both jurisdictions. Speaking of the New York indictments he said that "*similar* indictments" were returned in Washington. He wanted it understood that "should *the* trial here result in acquittal or conviction the indictments in New York will be dropped." He said "*the* real conspiracy" was probably formed, and that the "real *situs* of *the* crime" is, in the District of Columbia; and refers to the trial of Holmes, which occupied three weeks, and resulted in a disagree-

ment of the jury (p. 158), as "the *former trial of these cases.*"

Letter of Charles J. Bonaparte, pp. 159–160.

On the same day that these two series of indictments were found, the appellant appeared in the Circuit Court in New York, entered pleas of not guilty to the indictments returned there, and was bailed for trial before that court (p. 157).

On June 18 he withdrew these pleas and moved to quash the New York indictments on the ground that he had been compelled to be a witness against himself before the Grand Jury which found them. These motions came on for argument on June 24, but were not decided until October 1st, when an order was entered denying them, and directing the appellant to appear and plead on October 12 (pp. 156–7).

See *United States* v. *Price*, 163 Fed. Rep., 904.

On June 24, while the motions to quash were *sub judice*, the United States attorney for the Southern District of New York filed a complaint before Commissioner Shields in a proceeding instituted under Section 1014, for the purpose of removing the appellant to Washington for trial there.

The Commissioner immediately issued a warrant for the appellant's arrest, but the warrant was not executed until after the denial of the motions to quash the New York indictments, the defendant's counsel "having agreed to produce him when wanted" (p. 137).

On October 6, the United States Attorney served notice of a motion, returnable October 12, for the consent of the Circuit Court in New York to the prosecution of the removal proceedings. This motion was based upon an affidavit verified by himself, in which he specified as reasons why the defendant should be sent to Washington for trial, (1) that the "United States Attorney for the District of Columbia, and members of the Attorney-General's staff, resident in Washington, have had charge of this matter from its inception; (2) that it was impracticable to bring the cases to trial in the Southern District of New York before October, 1909; (3) that the United States Attorney for the District of Columbia was urgently requesting the removal; (4) that it was impracticable to try all of the cases together, the defendants Price and Peckham not being joined under the same indictment, and (5) that it appeared to be practicable to complete the defendant's trial in Washington "before he could in any event be brought to trial in this District" (Record, pp. 157–158).

Annexed to and forming a part of this affidavit was a letter from Attorney-General Bonaparte, in which, after settting forth that the "real *situs* of the crime was in the District of Columbia," he urged:

1. That it would be "a great convenience and a vast saving to the Government to try the defendants together"; that, though even this would necessitate two trials, one on each "series" of indictments, "if the non-resident defendants (viz., all except Holmes) are not removed to Washington, four trials would be needed, two in Washington, and two in New York.

2. That a great many of the Government's witnesses were residents of Washington, and for the most part officers and employees of the Department of Agriculture, including the Secretary, so that "should these officials be required to attend a trial in New York, not only would the work of the Agricultural Department be seriously hampered, but *matters of state* in which the Secretary's advice should be desired might be interfered with" (Record, pp. 159–160).

Accordingly, when the case came up on October 12, the defendant, instead of being permitted to plead to the New York indictments, was required to show cause why they should not give way to the removal proceedings.

The defendant, in opposing this motion, after pointing out that none of the overt acts which he was charged with having committed was alleged as having occurred in the District of Columbia, assigned as one of the reasons against his removal to Washington "that I am entitled to be tried by a jury of my residence, namely, of the Southern District of New York, wherein the charges preferred against me are in the said New York indictments alleged to have been committed, and in which every overt act charged against me, either in the New York indictments, or in the District of Columbia indictments, is alleged to have been committed by me; and under said circumstances I should not be subjected to trial in a distant district where I do not reside, or before a jury of such district." In response to the Attorney-General's representations as to the annoyance a trial in New York would occasion the Department of Justice, and the peril to which "*matters of state*" might

be subjected by the absence of the Secretary of Agriculture, he urged his own situation, and that a trial in Washington meant a total suspension of his business, involving him in great pecuniary loss. He showed that in the Southern District of New York the United States Attorney had practical control of the calendars of the Circuit Court, and could "prefer the trial of these indictments to the trial of others, if he considers that the public interest so requires."

In conclusion, he said: "Under these circumstances there is no occasion, for the purposes of a speedy trial, of depriving me of a trial before a jury of the District of my residence, and the District where I was born and raised, and have spent almost all my entire life, wherein every overt act charged against me, as well as the conspiracies themselves, are alleged to have been committed, or of subjecting me to the enormous burden and expense of a trial in the District of Columbia before an alien jury, necessarily constituted of men whom I have never known, and in a community in which I have never resided, and where I am an utter stranger, and where my reputation for probity will count for nothing. And I beg further to submit that I should not be subjected to this enormous hardship and this overwhelming expense merely to serve the fancied convenience of this District Attorney and certain clerks in the Department of Agriculture" (Record, pp. 153-155).

The New York court thought it had "no jurisdiction" to object "to the pursuit of such legal remedies as the courts or prosecuting officer of the District of

Columbia may have under the section of the Rev. Stat. referred to," and therefore "assented" to the legal right of that District "to the way pointed out by Statute" (Record, p. 160).

On the hearing before the Commissioner the Government introduced the Washington indictments (Record, p. 19) and evidence of the defendant's identity (pp. 21–29), and then rested. A part of this proof consisted of the affidavit from which we have just quoted.

In that affidavit the defendant swore (and no evidence was introduced to contradict or discredit his testimony in this regard): "I am a cotton merchant, and have been engaged in that business in the City of New York for upwards of twenty-five years, and during all that time I have resided, and still reside, in the City of New York, in the Southern District of New York, and I have never resided, or was engaged in business in the District of Columbia. During the period covered by the charges contained in said" (the Washington) "indictments, namely between the first day of November, 1904, and indeed for a considerable period prior thereto, and the first day of August, 1905, I was not in the District of Columbia on any occasion, unless possibly while on a train passing through said District to some point further South, and to the best of my recollection I was not in the District of Columbia at all during that said period. There was certainly no occasion during said period on which I was within the District of Columbia and there had any communication,

directly or indirectly, with the defendants, Haas and Holmes, or either of them" (Record, p. 153).

The Government stated that it introduced this affidavit for the purpose of showing "that he is under *these particular indictments* in the District of Columbia" (Record, p. 28), and also "to show that Mr. Price has admitted and sworn on oath that he is the person named in the Washington indictments mentioned in the moving papers, which, as appears from the record, are the same indictments as have been offered in evidence here to-day" (Record, p. 29).

This was the only evidence before the Commissioner tending to prove that the defendant was probably guilty of the supposed crime or crimes charged in the Washington indictments.

The defendant introduced the New York indictments, supported by evidence corroborating what he had said in the above affidavit on the subject of his absence from the District of Columbia at any of the times covered by the indictments, and offered other testimony to which the Court's attention will be called later.

The following facts are not disputed:

Among the bureaus of the Department of Agriculture there is, and has been since the 15th day of November, 1904, a bureau known as the Bureau of Statistics, under the management of an officer and employee of the United States, known as Statistician and Chief of the Bureau of Statistics.

In that bureau there were, among other officers and

employees, one who was known as Associate Statistician and another known as Assistant Statistician and Assistant Chief of the Bureau of Statistics, who acted in the place of the Statistician as chief of the bureau whenever the Statistician and Chief of the Bureau was absent. It was the duty of the Statistician, and in his absence of the Associate Statistician, to prepare during certain months in the year, reports upon the condition of the cotton crop in the United States, which were required by law to embrace statements of the condition of the crop by States with such explanations, comparisons and information as might be useful, and did contain among the items reported, statements of acreage planted or to be planted, and of the condition of the growing crop (Indictment, p. 117).

These items, though reported in mathematical form, represented merely the *guess* or *estimate* of the Chief Statistician and did *not* represent the result of any statistical compilation. And while it was the practice of the department to collect by means of an elaborate system of reports, the guesses or estimates of a vast number of persons of different ranks and classes throughout the cotton growing states, and to tabulate those estimates with a vast show of statistical system, the amount inserted in the report was arrived at without regard to the results thus tabulated, and was neither an average of the estimates, nor necessarily an amount fixed within their bounds; but a figure arrived at by the Statistician *upon the basis of his own judgment* (p. 82).

For the purpose of forming his judgment in arriving

at these final estimates, it was the practice of the department for the Statistician *to consult with any and all persons* who appeared to him to be possessed of any information on the subject, and to give to those unofficial sources of information such weight as to him seemed wise (pp. 81, 94).

There was nothing in the law or in the practice of the department which could or should have deterred him from consulting with the appellant or with Mr. Haas, his alleged co-conspirator, for the purpose of arriving at his conclusions, nor anything to deter him from permitting himself to be influenced by their opinions and modifying his own in accordance therewith.

In view of the nature of one of the charges against the appellant, namely, that he conspired to procure the report to set forth items different from those which would have resulted from a reliance upon certain sources of information mentioned in the indictment, these facts—namely, the non-statistical character of the report and the propriety of consulting with persons outside of the department for the purpose of forming it—become of great importance, and for that reason some elaboration of the evidence on that head will, we believe, be justified.

The facts were established by the testimony of Victor H. Olmstead, who was connected with the Department of Agriculture as chief of the bureau of domestic crop reports during the period to which the indictment relates (p. 73), and at the time of testifying, was the chief of the bureau of statistics (p. 72). This testimony is uncontradicted by other evidence, either

verbal or documentary, and though in elaboration of the allegations of the indictment is in nowise inconsistent with them. Hence, in so far as it is material to the determination of the issues here involved, it is conclusive of them.

The facts thus established, as to the method of preparing the report, were as follows:

Cotton crop reports were issued by the department six times each year, namely, in June, July, August, September, October and December (p. 77). These reports were issued during the early part of these months (pp. 102, 193) and related to the conditions existing in the latter part of the preceding month (p. 77).

Prior to the issuance of the Government reports, there were collected a series of answers to questions addressed to correspondents and to officials of various classes throughout the cotton states.

These correspondents numbered about 200,000 (p. 84), and were divided into the following classes:

1. Township correspondents, of whom there were approximately from two to seven in each county (p. 74).

2. County correspondents, of whom there was one in each county, and who was expected to have two or more sub-correspondents of their own (p. 74).

3. State statistical agents, one in each cotton growing state except Florida, who had a varying number of sub-correspondents (p. 74).

4. Special Field Agents who traveled throughout the states (p. 75).

5. Special correspondents consisting of dealers,

merchants, agricultural implement men, bankers, commission men, and men of that sort, who were supposed to have special knowledge of crop conditions (p. 75).

6. Individual farmers (p. 73).

7. Cotton ginners (p. 73).

For the reports other than the December report, only four of these sources were utilized, namely, the Field agent, the State Statistical agent, the County correspondent, and the Township correspondent (p. 78).

To each of these classes of correspondents, "schedules" were sent requiring an answer to two questions, namely, (1) the acreage of the crop compared with that planted the previous year; (2) the estimated condition of the crop as of the date of mailing, compared with a "*normal*" condition of growth and vitality (Exhibits 1–4, pp. 97 to 102, testimony, pp. 73, 74).

In each instance, these answers represented and were expected to represent mere "estimates" and in no instance did they represent a mathematical calculation of acreage or a scientific investigation of conditions (pp. 75, 76, 77).

The Township correspondent sent in his individual expression of opinion and belief as to the percentage of acreage planted as compared with the acreage of the preceding year, and his individual opinion and belief of the condition of the crop as compared to the normal (p. 75).

The County correspondent expressed an "opinion and belief" derived from his own impressions coupled with similar expressions of opinion and belief received from his sub-correspondents (p. 76).

The State Statistical agents had corps of sub-corre-

spondents of their own whose opinions and beliefs they relied upon in some undefined manner as the basis of their expressions of "opinion" (p. 77).

And the Field agents traveled throughout the cotton states and formed their opinions and beliefs which they conveyed to the head of the bureau (p. 77).

The statistical value of this mass of correspondence may be appreciated when it is realized that the answer to the question as to acreage involved on the part of each correspondent—1, his opinion and belief as to the acreage planted in the previous year, and 2, his opinion and belief as to the acreage planted during the current year, and 3, an ability to reduce these two indeterminate and indeterminable quantities to mathematical form; and that the answer to the question as to the condition involved in addition to the foregoing elements, a determination by the individual of the "normal" condition in his locality: "normal" being understood, by those who could understand it, to imply (we quote the language of the department):

> "The normal does not mean the average "condition, but such as would accompany favor- "able weather conditions, and complete im- "munity from insect pests and other injurious "agencies. At the same time, it does not rep- "resent the highest possible condition but one "higher than the average, and something below "the possible maximum" (Ex. 1, pp. 101–102).

When the individual solutions of these puzzle questions had been received by the department, they were tabulated in accordance with a highly elaborated and scientific statistical method; as follows:

The reports from each county were given a predetermined "weight," fixing the relative importance of that county to the rest of the state, the actual figures from each of the counties was multiplied by this "weight," and the aggregate of the extensions thus obtained was divided by the aggregate of the "weights," and thus the total for the State was arrived at, both as to acreage and condition (p. 80).

When this process had been performed, and the results of the opinions and beliefs of the County and Township correspondents for each of the States had been tabulated side by side in separate columns, there were added in another column the opinion and belief of the State Statistical agent, and the opinion and belief of the general field agent, expressed in like form, and these were presented to the Statistician with great solemnity and behind closed doors. Whereupon the Statistician continued the farce to the point of examining the tabulation, and then proceeded to make up the report by inserting therein *any figures that his judgment dictated.*

For it appears that the Statistician, being of the opinion that the greater the territory that was covered by his informant and the less his opportunity for minute or accurate observation, the greater would be the value of his "information" (p. 82), and apparently, having arrived at the very sensible conclusion that the whole system was absurdly valueless, would look upon these tabulated returns and then report, *not* the amounts resulting from such tabulations or from an average of them, but such figures as he saw fit, basing his

final report upon any information that he could get from any source official or non-official, and upon anything that came to his mind or to his knowledge that seemed worthy of credence (p. 94).

And thus the final result of all this elaboration, including the receipt, examination and tabulation of some 200,000 guesses, was that the head of the bureau made his own more or less independent guess, and that *his* guess constituted the report.

Lest in this statement we should appear to have exaggerated the opera bouffe character of this performance, we venture to quote from the testimony:

First, as to the nature of the individual reports:

> "These reports were from voluntary correspondents and *were not understood to be mathematical results or results of measurements . . . They reported their opinions and beliefs* (p. 75). . . . *none of those reports are based upon any actual survey or measurement* (p. 77). There was no actual count or enumeration of actual acreage or yields or any other subject concerning which inquiry was made in the field, as would be done under census methods . . . The idea being that those *reports were all estimates* (*Id.*).

Second, as to the tabulation of these results:

> "In one column would be entered the report of the special field agent for example, in the next column that of the State Statistical agent, and in the next column, the county reports, and in the next, the township, and so on for each State, right down the table so that the statistician would have before him the result of all those various classes of reports" (p. 80).

Third, as to the departmental estimate of the relative value of the various classes of reports:

> "Mr. Hyde" (the statistician and head of the bureau during the period in question; p. 87), "had a theory *the larger the field a man covered, the more likely he would be to represent the facts*, and he gave more weight to the field agent than to the State agents," etc. (p. 82).

Fourth, as to the method of arriving at the final results after the tabulations had been made:

> "His method (of making up a final estimate) was to take this sheet that I have just told you of, and on which all the results were tabulated in parallel columns, and taking into consideration the relative value of each class of reports, and he would fix a final figure for each State.
>
> Q. That is, *he would make an estimate?* A. Yes, sir, based on those other estimates (p. 81).
>
> Q. Now, would these estimates of his be based soley on these reports of correspondents or would they be based on other matters? A. (After his recollection had been refreshed). *The Statistician would use information that he could gain from other sources, from letters* written to him, *from interviews with people*, from special trips he would have made by employees to investigate some particular points, and from a variety of sources—*anything that came to his mind or knowledge that he considered worthy of credence* (p. 81).
>
> Q. What was the practice, Mr. Olmstead, in arriving at the final figures with respect to averaging the return from the various correspondents? A. *The practice was not to average them* . . .

> Q. *It is a fact, is it not, as you have just stated, that the final figures were a matter of his individual judgment?* A. Yes, sir; I said that " (p. 82).

So much for the facts bearing upon the nature of the report and the method of its preparation.

In addition to the proof bearing upon this issue, there was proof in regard to an alleged requirement of secrecy in relation to the report and the data collected for it, to the following effect: There was a rule, regulation, and practice of the department requiring these reports and the data upon which they were based to be kept secret from a general and undefined class of unauthorized persons—the power of authorization lying with the head of the bureau, or with the Secretary of Agriculture—except that there is no claim that the information might not be divulged to persons connected with the department.

Why the matter thus collected should be kept secret—unless for the purpose of stimulating sudden and violent fluctuations of the market upon the publication of the final guess—is hard to conceive, but the indictment charges (p. 113, 114):

> " that under the practice, custom and regulation of the said department established and sanctioned by the said Secretary of Agriculture, no officer or employee thereof to whom such information might come by reason of his office or employment has been permitted to issue, publish or divulge to unauthorized persons, and all such officers and employees have been prohibited from issuing, publishing or divulging to unauthorized persons, any such information so acquired as aforesaid, or any such cotton-crop

report, or any information indicating the probable contents or character of the same in advance of its official issuance and publication, or without its first being submitted to and officially approved by the Secretary."

The indictment avers further (p. 117, 118):

"That during the time and times aforesaid a custom and practice prevailed in the said Department of Agriculture, established and sanctioned by the said Secretary, under which the giving out to the public of any information collected by the said Bureau of Statistics or its said officers or its said employees to be used in the preparation of, or to be contained therein, of any of said crop reports, was prohibited, and the keeping of such information secret was required, except such information as was contained in said crop reports when and after the said—had been officially issued and published.

"And that during the time and times aforesaid the said statistician and associate statistician, and the other officers and employees aforesaid of the said Bureau of Statistics, were charged with the duty of honestly and carefully guarding and keeping secret and not divulging *to any person not employed in or connected with said Bureau of Statistics* any information acquired by him or them in the course of preparing and assisting in preparing the said crop reports and in collecting statistics and compiling statistical matter for use in the preparation of said crop reports, or any of the matters and things and other information which might be contained in any of said crop reports, until said crop reports had been prepared, officially approved, and issued and pub-

lished as aforesaid, and thereafter said duty of so maintaining secrecy as aforesaid continued, save and except as to the matters and things so officially made public in said reports."

The proof upon the issue, however, was that while elaborate precautions were taken to prevent the contents of the report from being known to the public prior to the moment of the official publication, private dispensations were occasionally granted by the head of the department (p. 96), and that the written rules in force permitted information to be disseminated provided it were done with the consent of the head of the department. (See rule of 1897 misprinted in the record 1907, p. 103.)

At the close of the evidence, a motion to dismiss the proceedings was made, setting forth the points above indicated, but the motion was overruled (pp. 105–6, 31–36, 149).

The Commissioner having found "that there is probable cause to believe the said Theodore H. Price guilty of the offenses charged," held him "for trial at the District of Columbia, being the district in which the offenses charged is alleged to have been committed," and thereupon committed him to the custody of the Marshal "until a warrant for his removal shall issue by the U. S. District Judge, or he shall be otherwise dealt with according to law" (Commitment, p. 149).

No application for a warrant of removal has been made, the writs having been issued immediately upon the defendant's commitment by the Commissioner, and an order having been entered upon their discharge

staying all proceedings pending the determination of this appeal (p. 198).

Errors relied upon.

On this appeal the following errors are relied upon:

That the Circuit Court erred in dismissing the writs of *habeas corpus* and *certiorari*, and remanding the petitioner (17th assignment, p. 200); in holding that his restraint was legal (19th assignment, p. 201); in refusing his discharge (18th assignment, *Id.*); in holding that his restraint was not a violation of his rights under the Federal Constitution (20th assignment, *Id.*), or unlawful (24th assignment, *Id.*), and that he was not thereby deprived of his liberty without due process of law (25th assignment, *Id.*), or in violation of his privileges and immunities under the Federal Constitution (26th, 28th and 29th assignments, *Id.*).

The points we desire to advance are sufficiently indicated by the above assignments, and it is therefore unnecessary to call the attention of the Court to those which more specifically present them.

FIRST POINT.

When an accused has been imprisoned or bailed for trial before a court of competent jurisdiction in the district where he lives, and where he was present when the alleged offense was committed, Section 1014 does not authorize his subsequent removal from that district for trial in another, even though a court in the latter district may also have jurisdiction to try him.

In the case at bar the Department of Justice is seeking to procure the removal of a citizen of New York from his home to the seat of the Federal Government in order that he may be there tried for an offense which, if any, was actually committed in the Southern District of New York, which is concededly triable there, and to answer which he has already been bailed under the provisions of the statute which is supposed to authorize the present proceeding. And the sole reason assigned for this course is that it will be easier for the Government to conduct the trial in Washington than in New York (Record, pp. 157–160).

At the outset of the proceeding the appellant asserted his right to be tried by a jury of his residence, and protested against the hardship and expense of a trial in Washington merely to serve the convenience of the Department of Justice (*Id.*, pp. 153–155).

The motion to dismiss the proceedings before the Commissioner was based upon the ground, among others, that having been held to answer and given bail

in the Southern District of New York, the appellant was "entitled to be tried for such offense in that district alone" (p. 106). The Commissioner evidently thought this to be "a matter for the determination of the District Judge" (see Record in *Haas* v. *Henkel*, No. 367, p. 451).

In the petition for the writs, referring to the New York indictments, he averred "your petitioner has given bail for his appearance to answer said indictments, and your petitioner is advised that under the provisions of the Constitution of the United States, and the amendments thereto, he is entitled to be tried upon the said charges of crime in the said Southern District of New York, and may not be tried therefor elsewhere" (Record, p. 7).

The 7th assignment of error specifies that the Circuit Court erred "in declining to hold and decide that the said Commissioner was without jurisdiction to commit your petitioner for removal to the District of Columbia, for the reason that said petitioner was under indictment in the Southern District of New York for the same offences charged against him by the indictments found in the District of Columbia, as disclosed by the record herein, it appearing that your petitioner had been arraigned upon the said New York indictments and had been admitted to bail" (*Id.*, pp. 199–200).

A.

The Government's contention is that the words "such court of the United States as by law has cognizance of the offense," as used in Section 1014, must be construed as though they read "any court in which the

offender *may be triable*," and that where the prosecution may be instituted in two or more jurisdictions, the Department of Justice may not only determine the particular district in which the defendant may be placed on trial, but may put him under bail as many times as there may be federal localities in which he may tried.

The defendant, on the other hand, contends that the plain language of the section precludes any such construction; that it was enacted for the sole purpose of enabling the criminal courts of the United States to bring before them and put on trial persons charged with offenses against federal laws who would otherwise entirely escape, and that it was not intended to empower the Department of Justice to transport for trial elsewhere a citizen who has been held for trial in the District where his supposed offense, if any, has been actually committed, simply because it subsequently develops that he can be tried more conveniently somewhere else.

In other words, since by the language of the statute the accused is to be imprisoned or bailed for trial before the court having cognizance of the offense, if he has been once committed to answer before a court of competent jurisdiction, the purpose of the statute is answered, and there is no warrant for a subsequent proceeding for his *removal* elsewhere.

B.

So far as we have been able to ascertain, the question here presented has never before been advanced. In discussing it, it is unimportant whether or not the case is one to which Section 731 of the Revised Statutes

applies (*In re* Palliser, 136 U. S., 257; Horner *v.* U. S., 143 U. S., 207; Benson *v.* Henkel, 198 U. S., 1), or whether Congress may constitutionally authorize the *trial* of an accused person at a place other than that in which he lived, or happened to be present, or really acted (Hyde *v.* Shine, 199 U. S., 62; Armour Packing Co. *v.* U. S., 209 U. S., 56). The point we urge involves the *construction* of the statute, not its constitutionality.

The Government will probably argue that the fact that in the past some persons have been removed under Section 1014 from the district of their domicile, and in which they acted, to other jurisdictions, is some evidence that the practice resorted to in the present case is correct; in other words, that the point we advance, if a good one, would have been made before. If this were true, it would hardly be a sound argument. While we do not know just how many such cases there have been, we think investigation will show that they have have been very few. But we assert with confidence that there never has been a case before the courts where, the defendant being already under bail to answer before a court of competent jurisdiction in the district where he was concededly present when the alleged offense was committed, his *removal* for trial in another district for the same crime has even been attempted, much less accomplished.

In the *Palliser* case, the petitioner, who resided in the Southern District of New York, was removed to Connecticut upon a charge of having made an unlawful offer or tender, contained in a letter mailed in New

York and addressed to a postmaster in Connecticut, to induce him to violate his official duty. Counsel for the petitioner contended that Section 731 did not apply, the offense having been completed when the letter was mailed in New York, and that if it did apply, it was unconstitutional and void (pp. 261–262). But the real question, said Mr. Justice Gray, was "whether this petitioner can be *tried* for this offense in the District of Connecticut" (p. 265). He expressed a doubt "whether any offense against the law of the United States was committed until the offer or tender was known to the postmaster, and might have influenced his mind. But," he added, "there can be no doubt at all that, if any offense was committed in New York, the offense continued to be committed when the letter reached the postmaster in Connecticut; and that *if no offense was committed in New York*, an offense was committed in Connecticut; and that in either aspect the District Court of the United States for the District of Connecticut had jurisdiction of the charge against the petitioner. *Whether he might have been indicted in New York is a question not presented by this appeal*" (pp. 267–268).

In the *Horner* case, the petitioner, a resident of New York, was removed to Illinois on a charge of violating Section 3894 of the Revised Statutes, which provides that the offender may be indicted, tried and punished, either in the district at which the unlawful publication was mailed, or to which it is carried or delivered by mail. It was urged that the petitioner was held for trial in Illinois for acts really committed in New York,

but the Court, following the *Palliser* case, held otherwise.

The rule laid down in the *Palliser* case was again applied in *Benson* v. *Henkel* (198 U. S., 1), where the petitioner, a resident of California, was removed from the Southern District of New York to the District of Columbia, upon a charge of violating Section 5451 of the Revised Statutes. It was there claimed that as some of the alleged offenses were committed in California, the petitioner was entitled by the Constitution to a trial in that jurisdiction. The case was clearly one of an offense begun in one, and completed in another, district (Rev. Stat., Section 731). In addition to this, however, it was *conceded* that some of the offenses charged in the various counts were committed in Washington (p. 16).

In the *Hyde* case (199 U. S., 62), the petitioner, who was also a resident of California, and was jointly indicted with Benson, was removed from that State to the District of Columbia. One of the points advanced was that "as the conspiracy was *triable in California or Oregon, as well as in the District of Columbia*, the offense was not cognizable in the Supreme Court of the District of Columbia, the jurisdiction of that court being limited to the trial of crimes 'not lawfully triable in any other court.'" It was held that the phrase above quoted had "reference only to other courts within the District, and was not intended to change the law with respect to the general jurisdiction of courts having jurisdiction of the same offense" (p. 77).

In these, and in other cases, questions have been

raised as to the power of Congress to put a man on trial elsewhere than at the place where he was when he did the act of which he stands charged. That question is not involved in the case at bar. For the purposes of the present argument, we might concede that Congress may authorize the *trial* of an accused at any place where he is alleged to have committed the crime charged, in whole or in part. The power of a court to exercise its jurisdiction is one thing; the power *to bring a citizen within that jurisdiction* is another.

C.

Jurisdiction of the offense exists whenever the offense was committed in whole or in part in a particular federal district. Jurisdiction to try the offender exists only after he has been brought into court.

If, for instance, a violation of a federal statute is committed in any part of the United States by the procuration of a resident of the Philippine Islands, who does not himself personally come here, such non-resident can be punished for his offense if jurisdiction can be obtained of his person. But the act of February 9, 1903 (32 Stat., 806; U. S. Comp. Stat. 1905, p. 164), prevents his removal to the United States, notwithstanding his crime cannot be punished in the Philippines, and hence is punishable nowhere.

A man who in New Jersey deliberately occasions the death of a human being in New York is guilty of murder in the latter State, and may be tried and punished there if apprehended within its territorial limits, but the

State of New York would nevertheless be unable to obtain jurisdiction of his person if he chose to remain in his own State.

Hyatt *v.* Corkran, 188 U. S., 691.

So that the fact that a federal court may have jurisdiction over an offense is no test of its power to bring the offender before it. That power, if it exists, must be found in some act of Congress expressly conferring it.

D.

It does not appear in any of the reported cases where removals under Section 1014 have been upheld that the prosecution was based solely upon acts committed by the accused in the district of his domicile. In none of them was he actually under indictment in that district for the identical acts for which it was sought to remove him for trial elsewhere. In none of them had he been previously bailed for trial in a federal court which concededly had cognizance of the offense. In every one of them the defendant was seeking to *avoid* trial on an indictment actually pending in a particular place, on the plea that the *venue* had been wrongly laid, and that the government *might have* instituted the prosecution in another locality.

The appellant in the case at bar, so far from seeking to avoid a trial, merely insists upon his right to be tried in the court which the Government itself originally selected as that wherein the trial should be had.

It is not a question whether Congress *could* competently authorize his removal under such circum-

stances, but whether it has done so. There being no reported instance in which the attempt has been made, there has heretofore been no occasion for raising the question. But even had there been, that fact, in the absence of any ruling on the point, would be of no consequence.

General warrants to apprehend persons suspected of the authorship of seditious libels were *frequently* issued in England from the time of the Revolution until Lord Camden's famous decision in Entick *v.* Carrington. Although they had been often produced on the return of writs of *habeas corpus* their validity had never been assailed, and no court of justice had ever declared them illegal. Lord Camden held that they acquired no strength from the silence of the courts. "As no objection was taken to them upon the returns," he said, "and the matter passed *sub silentio*, the precedents were of no weight."

11 Harg. St. Tr., 321.

E.

The provisions of the Constitution (1) forbidding, in respect of crimes against the states, the extradition of any but actual fugitives,[1] and (2) requiring the trial of all crimes against the United States (except in cases of impeachment) to be held not only in the state but in the particular "district wherein the crime shall have been committed"[2] were intended to preserve substantial and real rights, dependent upon actual conditions, and not upon legal fictions. It was to override such

[1] Art. IV., Sec. 2, Sub. 2.

[2] Art. III., Sec. 2, Par. 3, and Sixth Amendment.

fictions that the Revolution was fought and these provisions embedded in the organic law.

The principle that a man is not to be removed from the place where he was when he is alleged to have done the act of which he stands accused, when he can be tried in that place, for trial in another locality, was asserted long before the Revolution, and to prevent its encroachment, this principle was made a part of our organic law.

In 1693, Governor Phips of Massachusetts Bay refused the demand of Governor Fletcher of New York for the surrender of Abraham Governeur, charged with circulating in the latter colony a seditious letter attacking Fletcher's administration. Governeur, who had been a supporter of Leisler and had been imprisoned and condemned as a traitor, was afterwards pardoned, and went to Boston, where he wrote a letter to his parents characterizing Fletcher as "a poor beggar" who "seeks nothing but money and not the good of the country." After reciting "the ill consequences which this letter has produced" by its circulation in New York, Fletcher called upon Phips to return Governeur to New York, that being the place of "his former residence, and from whence he has fled with apparent designs of disturbing the peace of this government." Phips placed his refusal upon the ground that "if Governeur had done any wrong Coll. Fletcher might prosecute him at Boston."[1]

The position thus taken by Governor Phips in 1693 denied the doctrine of "constructive presence" a place in the American system of criminal law. Governeur's

[1] N. Y. Col. Doc., Vol. III., 368; *Id.*, Volume IV., 2, 5, 8, 9.

crime, if any, was actually committed in Massachusetts, where he then lived, and whose courts had jurisdiction to try him. To send him to New York in order that he might be tried in that colony for the technical publication resulting from the circulation of the libel there, would have been to render the administration of the criminal law oppressive, and was a thing not to be tolerated by a free people.

This was by no means a novel doctrine even in those times. Fifty years before, the plantations of Massachusetts Bay, New Plymouth, New Haven and those in combination therewith, had entered into Articles of Confederation, providing, among other things, for the mutual surrender of "any prisoner or fugitive for any criminal cause, *whether breaking prison or getting from the officer, or otherwise escaping*," and his "delivery to the officer or other person who pursueth him."

Moore on Extradition, Vol. II, p. 821.

It will be observed that this stipulation provided a means of reclaiming only such persons as, having actually committed crimes in one colony, sought refuge in another.

By the treaty of Hartford, concluded in 1650, between the English colonies and Governor Stuyvesant, of New Netherland, it was agreed that as to *fugitives* "the same method should be observed between the United English Colonies and the Dutch Nation in this country of New Netherland."

O'Callaghan, Laws & Ord. of New Neth., Preface.

This stipulation of the Hartford treaty was renewed in 1670 as between the English colonies.

Mass. Rec., Vol. IV. pt. 2, 471, 473; 13 Am. Law Rev., 181.

Among the propositions submitted by William Penn to the Lords of Trade in 1686 was that of an assembly composed of deputies from each colony with power "to hear and adjust all matters of complaint or difference between province and province, as . . . where offenders fly justice, or justice cannot well be had upon such offenders in the province that entertain them."

Moore on Extradition, Vol. II, p. 822, *note*.

There is also evidence in the colonial records of Pennsylvania of the existence of a custom of delivering up *fugitive* criminals, as between Pennsylvania, New Jersey, Maryland and Virginia before the adoption of the Articles of Confederation of 1777.

Id., p. 824.

But there is no indication that there was at any time during the colonial period any system or authority for the removal of an accused from the colony where he lived, and whose laws he had offended, for trial in another colony, because his act might also be criminally cognizable there. On the contrary, the method then in vogue at least impliedly forbade the surrender of any except actual fugitives, even though they could not be tried in the colony which harbored them, and thus entirely escaped justice.

We can well imagine, then, the consternation with which the colonies received the assertion of Great

Britain's right to transport offenders against the laws of the colonies for trial in England.

This doctrine, to them antagonistic to every principle of natural justice, was advanced in February, 1764, when the two houses of Parliament presented a joint address to the King in which he was requested, in order to bring to condign punishment the instigators of the disorders then prevalent in Massachusetts, to direct the Governor of that colony "to take the most effectual methods, for procuring the fullest information that can be obtained touching all treasons or misprisions of treasons committed within his government since the 30th day of December last, and to transmit the same, together with the names of the persons who were most active in the commission of such offences, to one of his Majesty's secretaries of state, in order that his Majesty may issue a special commission for inquiring of and hearing and determining the said offences, within this realm, pursuant to the provisions of the 35th Henry VIII,[1] if his Majesty shall, when receiving the said information, see sufficient ground for such a proceeding."[2]

[1] This act (c. 2) enacted that all offenses already made or declared, or thereafter made or declared, to be treason, misprision of treason, or concealment of treason, committed by any person out of the realm of England, might be tried by the Court of King's Bench by a jury of the shire in which the court sat, or before commissioners assigned for the purpose by the King in any shire; this not to interfere, however, with the privilege of peers to be tried by their peers. See Stephen, Hist. Cr. L. Eng., Vol. II. pp. 14-15. "By virtue of an obsolete law, passed in one of the darkest periods of English history, and at a time when England possessed not a single colony, any colonist who was designated by the governor as a traitor might be carried three thousand miles from his home, from his witnesses, from the scene of his alleged crime." Lecky, England, Vol. III, 394-5.

[2] Pitkin, Vol. I, p. 235. Appendix, p. 463, note 13; Cobbett-Hansard, Parl. Hist. XVI. pp. 476-487; Cavendish; Debates, Vol. I, pp. 192-194; American Nation, 1763-1775, pp. 198-199.

The statute referred to was based upon the doctrine of constructive presence which the American colonists had always refused to accept. Treasonable conspiracies actually entered into "out of the realm" necessarily imperilled the existence of Government in every part of England, and according to the notion of the English Ministry the conspirators might therefore be deemed to be present wherever their acts took effect, and so triable in "any shire."[1]

The colonies, though enraged to a pitch in which the actual transportation of any patriot would have precipitated the impending rebellion, entered into no discussion of the legality of this measure. Their attitude was that this method of enforcing the criminal law made it oppressive, and that Parliament had exceeded its authority in admitting the validity of a statute so opposed to the sense of natural justice. As Lord Acton expresses it, in describing the position taken taken by James Otis with reference to the odius writs of assistance: "There are principles which override precedents. The laws of England may be a very good thing, but there is such a thing as a higher law."[2]

Thus the House of Burgesses in Virginia declared "that all trials for treasons, misprision of treason, or for

[1] In Massachusetts, under orders from Hillsborough, evidence was actually collected by the Governor and other crown officers to enable them to send offenders to England for trial under this act. Affidavits against Samuel Adams, John Hancock and others, sworn to before Hutchinson, were sent to England, to prove them fit to be transported. American Nation (Preliminaries of the Revolution) p. 201; Bancroft (Ed. of 1885) Vol. III. 332; Barry's Massachusetts, Vol. II, p. 480; Wells: Life of Samuel Adams, Vol. II, p. 190; "Do you write me word of their being seized," said Mauduit in London, "and I will send you an account of their being hanged." *Id.*, Vol. I, p. 292.

[2] Lectures on Modern History, p. 308.

any felony or crime whatever, committed by any person residing in the colony, ought to be in and before his Majesty's courts in the colony; and that the seizing of any person residing in the colony, suspected of any crime whatever, committed there, and sending such person to places beyond the seas to be tried, is *highly derogatory of the rights of British subjects*, as thereby the inestimable privilege of a trial by a jury from the vicinage, as well as the liberty of producing witnesses on such trial, will be taken away from the party accused."

In their petition to the King they said, on the same subject: "How truly deplorable must be the situation of a wretched American, who, having incurred the displeasure of any one in power, is dragged from his native home and his nearest domestic connections, thrown into a prison, not to wait his trial before a court, jury or judges from the knowledge of whom he is encouraged to hope for speedy justice, but to exchange his imprisonment in his own country for fetters among strangers; conveyed to a distant land, where no friend, no relation will alleviate his distress, or minister to his necessities, and where no witnesses can be found to testify to his innocence; shunned by the respectable and honest and consigned to the society and converse of the wretched and abandoned, he can only pray that he may soon end his misery—with his life."[1]

Among the tyrannical measures of the Parliament of 1774 was the act providing that anyone accused of a capital offense should, if the act was done in resisting

[1]Pitkin, Vol. 1, p. 236-7; Select Charters, pp. 334-335.

the execution of the law of Massachusetts, be tried in Nova Scotia or Great Britain.[1]

This act sought to give effect to the same legal fiction upon which the statute of Henry VIII proceeded. Resistance to the execution of the laws of Parliament *at any place*, operated to destroy the authority of government everywhere in British jurisdiction, and the offender might therefore be justly regarded as constructively present in any particular portion of the territory subject to its control wherein the Crown officers chose to lay the *venue*.

"Against this, and other new legislation affecting Massachusetts it was resolved that at the time of the emigration, the colonists were entitled to all the rights, liberties and immunities of free natural-born subjects within England, that they had not by their emigration, forfeited, surrended or lost any of those rights, and that their descendants were still entitled to exercise and enjoy the same, so far as circumstances enable them to do so. Accordingly the colonists were entitled to the common law of England, and more especially to the great and inestimable privilege of being tried for crime by their peers of the vicinage by the course of that law. The legislation in question was unjust, unconstitutional, destructive of the rights of Americans. Necessity was, of course, the justification urged. Boston juries could not be depended upon to convict Boston citizens of crime in resisting officers of the British government, or to acquit officers under indictment

[1]Pol. Hist. Eng., Vol. X, p. 129; Grahame, Vol. IV, p. 345; Bryant, Vol. III, p. 375.

for acts done by them in the discharge of their duty; to which sarcasm might reply that British juries could be depended upon to convict in the one case and aquit in the other for want of witnesses who heard and saw. Men accused of crime in Massachusetts must be tried by a Massachusetts jury, not merely because British juries would be apt to be prejudiced against them for what they had done against natives of England, but because witnesses in favor of the accused would not be present at the trial there, or if present, would probably be overawed. So Americans maintained, and that view passed into the state constitutions, and then into the Sixth Amendment to the Constitution of the United States."[1]

In the Declaration of Independence the King was arraigned for countenancing measures "For depriving us, in many cases, of the benefits of trial by jury; for transporting us beyond seas to be tried for pretended offenses."

To prevent the enactment of similar measures the states, by the Articles of Confederation disabled themselves from surrendering any but *actual* fugitives from justice:

---

[1]Prof. Bigelow, in Cambridge Mod. His., Vol. VII, p. 187. It is said that when General Gage received orders in 1775 to send the obnoxious leaders to England he answered that should he attempt to follow his instructions that would be the last they would hear from him, for he should be knocked on the head. Walpole's Reign of George III, Vol. I, p. 486. After this, news of reinforcements having arrived, Gage grew bolder and resolved to carry out the plan of seizing Hancock and Adams, but at the critical moment Paul Revere's famous ride saved them. Frothingham's Siege of Boston, pp. 58-59. Elbridge Gerry despatched an express to Hancock warning him that officers of the royal army had been sent out in advance of the troops and that some evil design was suspected. Wells: Life of Samuel Adams, II, 291.

"If any person guilty of, or charged with treason, felony or other high misdemeanor in any state, *shall flee from justice* and be found in any of the United States, he shall, upon demand of the Governor or Executive power of the state from which he fled, be delivered up and removed to the state having jurisdiction of his offense."

Art. IV, Subd. 2.

The Articles of Confederation were agreed to July 9, 1777, when the country was engaged in a war which had been precipitated as much by the assertion of the right to extradite and remove to England offenders who were not fugitives, as by any other cause. Ten years later the same principle was engrafted in the Constitution in the following form:

"A person charged in any state with treason, felony or other crime who shall flee from justice and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

Art. IV, Sec. 2, Subd. 2.

These provisions dealt only with removal for offenses against the laws of the States; but the framers of the Constitution incorporated in that instrument the same limitation as to the *situs* of federal prosecutions. This was accomplished by Article III (Sec. 2, Par. 3):

"The trial of crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the

trial shall be at such place or places as the Congress may by law have directed."

That the fundamental and ultimate purpose of this provision was to prevent the removal of an accused from the place where he was when the offense was committed and was triable, for the purpose of putting him on trial elsewhere, seems to us to be perfectly obvious. But in 1788 there was by no means a unanimity of opinion that this purpose had been fully effected.

The constitution defined treason, Congress was given express power to provide for its punishment, as well as for the punishment of piracy and offenses against the law of nations, and implied power to define and punish other crimes against the national sovereignty; and upon the federal courts an extended jurisdiction was conferred. In the absence of an express prohibition it was feared that Congress might enact statutes permitting in respect of federal offenses a procedure based upon the hateful doctrine of "constructive presence."

Thus, Patrick Henry, in the Virginia convention, June 9, 1788, speaking of the clause giving the federal courts jurisdiction of all controversies arising under the constitution or under the laws made in pursuance thereof, said:

"Are we not told that it shall be treason to levy war against the United States? Suppose an insult offered to the federal laws at an immense distance from Philadelphia—will this be deemed treason? And shall a man be dragged many hundred miles, to be tried as a criminal, for having, perhaps justifiably, resisted an un-

warrantable attack upon his person or property? I am not well acquainted with federal jurisprudence; but it appears to me that these oppressions must result from this part of the plan. It is at least doubtful; and where there is even a *possibility* of such evils, they ought to be *guarded against.*"

Elliot's Debates (2nd Ed.) Vol. III, p. 168.

John Marshall answered him in this language: "Will a man on the Eastern Shore be sent to be tried in Kentucky; or a man from Kentucky be brought to the Eastern Shore to have his trial? *A government by doing this would destroy itself.*"

Id., p. 562.

It is nevertheless to be observed that the Sixth Amendment confined criminal trials not only to the state, but to the particular district in which the crime was committed.

Speaking of these limitations upon the federal power, Judge Story says:

"It is observable that the trial of all crimes is not only to be by jury, but to be held in the state where they are committed. The object of this clause is to secure the party accused from being dragged to a trial in some distant state, away from his friends and witnesses, and neighborhood, and thus to be subjected to the verdict of mere strangers, who may feel no common sympathy, or who may even cherish animosities or prejudices against him. Besides this, a trial in a distant state or territory might subject the party to the most oppressive expenses, or perhaps even to the inability

of procuring the proper witnesses to establish his innocence. There is little danger, indeed, that Congress would ever exert their power in such an oppressive and unjustifiable a manner. But upon a subject so vital to the security of the citizen, it was fit to leave as little as possible to mere discretion. By the common law, the trial of all crimes is required to be in the county where they are committed. Nay, it originally carried its jealousy still further, and required that the jury itself should come from the vicinage of the place where the crime was alleged to be committed."

Story on the Constitution (5th Ed.), Vol. II, p. 560.

This is also the view of Judge Cooley, who says: "The jury must also be summoned from the vicinage where the crime is supposed to have been committed; and the accused will thus have the benefit on his trial of his own good character and standing with his neighbors, if these he has preserved; and also of such knowledge as the jury may possess of the witnesses who may give evidence against him. He will also be able with more certainty to secure the attendance of his own witnesses."

Constitutional Limitations (7th Ed.), p. 459.

The paramount purpose of these constitutional provisions was to secure a presumably innocent man from the hardship of being removed to a distant place when the case was one that could be tried in a court of his own jurisdiction. They were intended to put at an end, and for all time, the doctrine under which Eng-

land has asserted the right to remove its American subjects from their homes to England, to be tried there for offenses which could be tried in the colonial courts.

F.

At its first session, and on September 24, 1789, which was the day before the first ten amendments were, by a resolution of Congress, submitted to the several state legislatures, the Judiciary Act was approved by President Washington.

No crimes or offenses against the United States had then been defined or made punishable by Congress, the first crimes act not having been approved until April 30, 1790.

The 33d section of the Judiciary Act enabled the holding for trial of offenders against federal laws. Its language was as follows:

"§ 33. *And be it further enacted*, That for any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace, or other magistrate of any of the United States where he may be found, agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested, and imprisoned or bailed, as the case may be, for trial before such court of the United States as by this act has cognizance of the offense. And copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case; which recognizances the magistrate before

whom the examination shall be, may require on pain of imprisonment. And if such commitment of the offender, or the witnesses, shall be in a district other than that in which the offense is to be tried, it shall be the duty of the judge of that district where the delinquent is imprisoned, seasonably to issue, and of the marshal of the same district to execute, a warrant for the removal of the offender, and the witnesses, or either of them, as the case may be, to the district in which the trial is to be had."

1 Stat. L., p. 91.

By the Act of August 23, 1842, "the commissioners who now are, or hereafter may be, appointed by the circuit courts of the United States to take acknowledgments of bail and affidavits, and also to take depositions of witnesses in civil causes," were empowered, among other things, to exercise "all the powers that any justice of the peace, or other magistrate, of any of the United States may now exercise in respect to offenders for any crime or offense against the United States, by arresting, imprisoning or bailing the same, under and by virtue of the thirty-third section of the act of twenty-fourth of September, Anno Domini seventeen hundred and eighty-nine, entitled 'An Act to establish the judicial courts of the United States.'"

5 Stat. L., pp. 516–7.

These provisions were re-enacted in 1874 as Section 1014 of the Revised Statutes, in the following language:

"For any crime or offense against the United States, the offender may, by any justice or judge of the United

States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

U. S. Comp. Stat., Vol. I, p. 716.

G.

What was the purpose and intent of Section 33 of the Judiciary Act of 1789, the re-enactment of which as Section 1014 of the Revised Statutes is the authority for the present proceeding?

It is not necessary to inquire whether Congress *may* authorize the removal of a person charged with a conspiracy, to any part of the national territory in which it is alleged an act in pursuance of the conspiracy has been committed. The question is, *did*

Congress undertake to do so by Section 33 of the Judiciary Act of 1780.

The answer is to be found in the language of the law itself. It authorizes the arrest "after process issued agreeably to the usual mode of process against offenders in such states" of a person accused of a crime against the United States, in any state in which he may be found, and his imprisonment or release on bail "as the case may be, for trial before such court of the United States as by law has cognizance of the offense."

While the statement of principles in the Declaration of Independence may not, as Mr. Justice Brewer has said, have the force of organic law, or be made the basis of judicial decisions as to the limits of governmental power, for which reference must always be had to the Constitution, nevertheless the latter instrument is but the body and letter of what the Declaration is in thought and spirit, and it is always important to read the letter of the Constitution in the spirit of the Declation of Independence.

Gulf, &c., Ry. *v.* Ellis, 165 U. S., 150, 180.

When we consider this enactment of our very first federal legislature, passed almost contemporaneously with the ratification of the Constitution, and in advance of any measure defining or punishing crimes against the national government, must we not suppose that the removal of accused persons for trial in remote places, when such trial could take place in the state and district of their own domicile, was the very last thing that Congress had in mind?

There is no ambiguity in the language of the statute. It is not a *removal* statute, as it has been so often termed, but an authority to imprison or bail offenders "for trial before such court of the United States as by law has cognizance of the offense." It authorizes removal *only* when the offender is committed in a district other than that wherein the offense is to be tried. *Then only* is the judge to issue, and the marshal to execute, a warrant for his removal.

What could be plainer than that, where the offender is charged with an offense cognizable in the district where he is found, he must be committed for trial in that district, and that it is only when he is found in a district in which the federal courts are without jurisdiction that he is to be transported for trial in another.

The Department of Justice construes the section as though it authorized the offender to be "imprisoned or bailed, as the case may be, for trial before any court of competent jurisdiction in which the attorney-general may think it most convenient or expedient to try him."

But by the constitution the *situs* of a criminal trial is not to be made dependent upon the will, or option, or preference of the law officers of the government.

Let us suppose that in the Congress of 1789 some member had offered a bill declaring, in terms, that whenever a crime had been committed for which an indictment might lie in either of two or more districts of the United States, it should be for the Attorney-General to fix upon the district he preferred as the place of trial, according to the convenience of the Department of Justice, and that the defendant might

thereupon be removed from the district where he was present and actually committed the alleged crime, and put on trial in the district selected by the Attorney-General.

Can it be believed that such a measure would not have been received with an outburst of indignant protest from practically every member of both Houses? Yet it is contended that the Judiciary Act accomplished precisely this result. If so, Congress conferred upon the national government a power, by the exercise of which, as Marshall said, it would *destroy itself*.

II.

The due and orderly enforcement of the criminal laws of the United States will not be in anywise interfered with by the construction for which we contend.

If persons charged with federal offenses are not removable except on proof of their presence at the time of the commission of the supposed offense in the district to which removal is sought, that fact affords no obstacle to the complete enforcement of the criminal laws of the United States.

The recent practice of indicting residents of distant judicial districts at the seat of Government at the selection of the Department of Justice, because some part of the transaction which is the basis of the prosecution was done, or took effect, in that jurisdiction, the parties being actually elsewhere, is doubtless very frequently convenient from the standpoint of the government, by enabling the joint trial of several

defendants, because of the easier production of evidence, or otherwise; but these considerations cannot justify the corresponding disadvantages and hardships to which such a course subjects the accused.

The argument of convenience might, perhaps, have some force if, without the power of removal in this class of cases, the United States would be in some instances disabled from prosecuting and punishing violations of its laws. But there is no difficulty in this respect. Section 731 of the Revised Statutes expressly provides that in the case of federal offenses commenced in one district and completed in another the trial can be had in either, and in the case of conspiracies there is authority to the effect that the offender can always be tried at the place where he personally committed an overt act; so that an offender against the laws of the United States can always be tried in the district where he was when the supposed offense was committed. It is obvious, then, that when he is found in that district there can never be any proper occasion, much less necessity, for removing him to another district for trial. If, on the other hand, he voluntarily leaves the district where he has acted, and is subsequently found in any other, however remote, the statute then affords a means of securing his *return* to the scene of his crime for trial there.

I.

Inasmuch as statutes are to be interpreted in the light of all that *can* be done under them (194 U. S., 83), and not in the light of what a just, broad-minded At-

torney-General would probably do in a given case, it is easy to see into what an instrumentality of tyranny and oppression Section 1014 might be converted, were the claim here advanced by the Department of Justice to be upheld.

These indictments have been found in but two districts. There are, however, cases where indictments could be returned in even more jurisdictions. Let us suppose a conspiracy pursuant to which overt acts have been committed in four different federal districts, the defendant being at all times at the same place, indictments returned in each district and a trial permissible in either, provided jurisdiction of the defendant's person were obtained. Could he, in such a case, after being held for trial in the place where he acted and was found, and was triable, be subsequently removed to the second for trial there, then to the third for trial there, and subsequently to the fourth district for trial there, in order that, this being accomplished, the Attorney-General might thereupon determine the most convenient place to actually put him on trial? The mere statement of such a proposition shows its inadmissibility.

The statute itself plainly intended a single holding for trial, not successive proceedings with a view to a possible trial in whatever district the Attorney-General might eventually fix upon.

An alleged offender on being arrested was to be imprisoned or bailed before such court as by law had cognizance of the offense. This being done, unless it subsequently developed that that court was with-

out jurisdiction, the purpose of the statute was fulfilled.

There is no such situation here. It is conceded that before any attempt had been made to remove him to Washington the defendant had been held to answer in the court which both parties concede had jurisdiction to try him.

J.

As showing not only the hardships, but the absurd consequences to which the construction urged by the Government might lead, we may point out that if Section 1014 permits the removal of a person charged with conspiracy from his home to any district in which an overt act is alleged to have been committed, although he was never there, it also permits the removal of a person responsible for the publication of a newspaper libel to any district in any of the States in which he has caused copies of the offending sheet to be circulated; for every federal district contains one or more places which have been ceded to the United States and are under its exclusive jurisdiction. Section 5391 of the Revised Statutes provides:

"If any offense be committed in any place which has been or may hereafter be ceded to or under the jurisdiction of the United States, which offense is not prohibited by, or the punishment thereof is not specially provided for, by any law of the United States, such offense shall be liable to and receive the same punishment as the laws of the State in which such place is situated, now in force, provide for the like offense when

committed within the jurisdiction of such State; and no subsequent repeal of any such State law shall effect any prosecution of such offense in any court of the United States."

Notwithstanding the putting in circulation of the entire edition of a newspaper in the ordinary course consists in a single act; performed at the place of original publication, a *technical* publication also takes place in every post office, custom house or other federal corner to which it is sent. Is it to be imagined that a newspaper publisher or editor may be carried from his home, and put on trial in any part of the Union over which Congress has exclusive jurisdiction, to appease the vengeance of an individual who, regarding himself aggrieved by something printed in a newspaper of general circulation, succeeds in inducing a United States attorney to institute a prosecution under Section 5391?

To paraphrase the language used by Judge COOLEY in his note on the first Dana case (7 Ben., 1): "It would be a singular result of a revolution where one of the grievances complained of was the assertion of the right to send parties abroad for trial, if it should be found that a person who at his home had committed an offense against the United States, triable at that place, might be removed, as a fugitive criminal, for trial in any district of the United States in which his offense may also be cognizable."

Constitutional Limitations, p. 459, *note*.

K.

We are confident that so far from *extending* the operation of Section 1014 in the manner urged by the Government, this court will limit its application to the purposes it was intended to serve.

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to *injustice, oppression or an absurd consequence*. It will always, therefore, be presumed that the legislature *intended exceptions* to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter.

Field, *J.*, in *U. S.* v. *Kirby*, 7 Wall., 486.

In *Varick* v. *Briggs*, 6 Paige (N. Y., 323, Chancellor Walworth said: "In construing statutes, however, it is not reasonable to presume that the Legislature intended to violate a *settled principle of natural justice*, or to destroy a vested title to property. Courts, therefore, in construing statutes, will always endeavor to give such an interpretation to the language used as to make it *consistent with reason and justice*."

The rule laid down by Lord Bacon, in his essay "On Judicature," is controlling to-day: "Judges must beware of *hard constructions* and *strained inferences;* for there is no worse torture than the torture of laws; especially in case of laws penal they ought to have care that that which was meant for terror be not turned into rigour; and that they bring not upon the people that shower whereof the Scripture speaketh, *pluet super eos laqueos;* for penal laws *pressed* are a shower of snares upon the people. Therefore let penal laws, if they have

been sleepers of long, or if they be grown unfit for the present time, be by wise judges confined in the execution."

Works, Ed., 1824; Vol. II, pp. 383-4.

SECOND POINT.

There was no evidence before the Commissioner of probable cause to believe that the defendant had committed any crime in the District of Columbia.

To justify the defendant's removal to the *District of Columbia* it was incumbent upon the Government to establish by competent legal evidence the fact that there was probable cause for believing him to have been guilty of a crime *in that District.*

Tinsley *v.* Treat, 205 U. S., at p. 32.

(*a*) The Washington indictments showed that as the result of an inquiry instituted by the Government a responsible, and presumably the proper, tribunal had adjudicated that there was such probable cause, and those indictments standing alone were at least *prima facie* evidence of that fact (Beavers *v.* Henkel, 194 U. S., 73, 84–85).

But the defendant proved by the New York indictments that simultaneously with the Grand Jury proceedings in Washington the Government had instituted another investigation into the same transaction before the Grand Jury of the Southern District of New York, and that as the result that investigation had obtained from another equally responsible tribunal, which was

also, presumably, the proper one, an adjudication evidenced by those indictments that the *Southern District of New York*, and not in the District of Columbia, was the *situs* of the supposed conspiracies, and that the overt acts set forth in all of the indictments were committed pursuant to a conspiracy concocted at that place and not in Washington.

The probative value of the indictments found in the two different localities being precisely the same, if the evidence furnished by the Washington indictments as to the *locus* of the alleged criminal transaction was contradicted in that respect by the evidence furnished by the New York indictments, the result was that there was no evidence whatever before the Commissioner of this essential feature of the case.

If the defendant on May 31st, 1905 (Complaint, First, Third, Seventh, Ninth and Tenth Counts; Record, pp. 107–111), and on November 15th, 1904, and at all times between that day and on the 5th day of July, 1905, and on the said last mentioned day (Second and Ninth counts, *Ibid.*), conspired at the Southern District of New York to accomplish the objects set forth in the New York indictments, and the overt acts alleged in that indictment were committed pursuant to that conspiracy entered into in that District, it cannot be true either that he on the same days conspired in the District of Columbia to accomplish the same identical objects or that the same overt acts were committed in pursuance of a conspiracy formed in the latter district, as charged in the Washington indictments.

The only evidence of anything done by any of the

defendants in Washington is that supplied by the indictments in the form of allgations of overt acts. None of these aver that the defendant Price did anything there. Haas is said to have journeyed from New York to Washington, and to have promised and given money to Holmes, and the latter is said to have communicated advance information to Haas for transmission to Price, and to have sent a telegram to Price; but though each of these acts is alleged in the Washington indictments to have been done "in pursuance of the said unlawful conspiracy, combination, confederation and agreement," namely, a conspiracy charged to have been entered into "*at the said District of Columbia*," this is distinctly and directly contradicted by the New York indictments, the latter averring them to have been done pursuant to a conspiracy entered into "*at and within the said city and Southern District of New York*."

It will probably be argued that a conspiracy, wherever formed, may be prosecuted in any jurisdiction where an overt act in pursuance of the conspiracy is committed—and there are authorities to that effect—and that there is therefore nothing inconsistent in the findings of the two Grand Juries. In other words, it may be contended that inasmuch as the defendant *may have* rendered himself liable to indictment in Washington, either by entering into the alleged conspiracy there or because of acts committed there in pursuance of a conspiracy entered into in New York, the Commissioner had a right to assume, and this Court will similarly assume, that the Washington prosecution was instituted upon one or the other of these theories? The answer is

that it is entirely uncertain which was the actual theory, for all of the indictments allege that overt acts were committed both in New York and Washington. The same reason, moreover, applies equally to the New York indictment, and so eliminates from the case all proof whatever as to the *place* where the alleged crime was actually committed.

(*b*) The same conclusion must be reached if we treat the indictments as merely secondary evidence of the facts which they allege.

The probative force of an indictment from this standpoint is well stated in *U. S.* v. *Greene*, 100 Fed. Rep., at 943, where the Court says that "an indictment when offered by the prosecution is at best but evidence in no way conclusive, and in truth is but secondary evidence (which to a certain extent is admissible on such examinations); and that although the copy of an indictment may be treated as an affidavit it is nevertheless to be judged by the same rules as other affidavits and given weight only according to the nature and character of its averments, and the facts and circumstances which it sets forth, if any, in a manner sufficient to warrant the conclusion of probable cause to believe the accused guilty."

See also *In re Dana*, 68 Fed. Rep., 886.

Even if we admit that the Washington indictments establish *prima facie* that the offense was committed in the District of Columbia, judging them by the rules applicable to conflicting affidavits, their effect is neutralized by the New York indictments, and the *prima facie* case of probable cause established by the

Government is overcome, and this being the result, *the presumption of the defendant's innocence* to which he is entitled at all stages of the proceedings, enures to his protection, so that there remains no evidence whatever before the Commissioner upon which to base a finding of probable cause.

"The presumption in favor of innocence of crime is not restricted to proceedings instituted for the purpose of punishing the supposed offense, but applies equally in all proceedings, for whatever purpose, whether the guilt of the person comes in directly or collaterally."

22 A. & E. Enc. L. (2nd Ed.), 1282, and cases there cited.

(*c*) But not only was the *prima facie* case of the Government completely overcome, but the Government itself introduced affirmative and conclusive evidence showing that the defendant had committed no crime in the District of Columbia. This consisted of the affidavit made by the defendant, in opposition to the Circuit Court's consent to the removal proceeding. This affidavit (Record, p. 152), must be taken in its entirety as part of the Government's case.

People *ex rel.* Perkins *v.* Moss, 187 N. Y., 410.

It shows conclusively that the petitioner was not in the District of Columbia at any of the times mentioned in the various indictments, and therefore "could not be guilty" of the crime therein charged.

Hyde *v.* Shine, 199 U. S., 62.

This evidence of the defendant's absence from the District of Columbia was thoroughly corroborated by

the uncontradicted testimony of several witnesses introduced on his behalf (pp. 52–56).

In Hyde *v.* Shine (*supra*) this Court disagreed as to whether a *certiorari* ought to have issued under the circumstances there disclosed. But there was no intimation on the part of the majority as to the soundness of the view thus expressed by Mr. Justice Peckham, and in which Justices White and McKenna concurred.

The majority thought the issuance of a *certiorari* discretionary, and that the appellant "had nothing to complain of in the denial of the writ, and his petition should have set forth the evidence relied upon to show a want of probable cause."

The minority thought otherwise, and Mr. Justice Peckham thus stated the ground of their dissent:

"I think this is not the case for the application of the rule stated in the cases cited in the opinion of the court. . . . The result of the refusal in this case is to prevent the review of the findings of the commissioner before whom the original proceeding was had, upon the question of probable cause. I admit that the weight of evidence will not in such cases be reviewed here, but evidence which *conclusively rebuts* the presumption of probable cause arising from the indictment and which is uncontradicted, may be looked at, and a finding of probable cause reversed. In order to refer to it the evidence must be part of the record, and in such a case as this the application for a writ of *certiorari* to bring up the evidence which the petitioner avers shows such fact is not addressed to the discretion of the Court, but, on the contrary, the

petitioner has the right to demand that it shall be granted. The right is none the less, when the want of probable cause rests upon *conclusive evidence of the absence of the defendants from the district at the time when the indictment alleges the conspiracy was formed in such district. If defendants were not then there they could not be guilty of the crime charged in the indictment.* This case is an extreme illustration of the very great hardship involved in sending a man 3,000 miles across the continent, from California or Oregon, to this District for trial, where he is to bring his witnesses, and where on such trial it will appear that the court *must direct an acquittal*, because the averment of the formation of the conspiracy at Washington, D. C., is shown to be false to a demonstration.

"The expense of a defendant in his necessary preparation for trial, and in procuring the attendance of witnesses in his behalf from such a distance, must necessarily be enormous, and in many, if not in most cases, utterly beyond the ability of a defendant to pay. The enforcement of the criminal law should not be made *oppressive* in such cases, and, therefore, when it appears there was *no probable cause to found the indictment upon*, the order of removal should be refused."

THIRD POINT.

Neither of the indictments charges the commission of any crime against the United States and hence they afford no basis for removal proceedings nor any justification for any detention thereunder.

Preliminary.

The removal proceeding is based solely upon the two indictments alleged to have been found in the District of Columbia, and the uncontradicted proof in explanation of their allegations hereinbefore referred to. No other proof of "probable cause" has been offered, and if the indictments read, in the light of this proof, do not charge the accused with the commission of any offense, it is obvious that the Commissioner was without jurisdiction to entertain the proceeding, or to order the removal, and that the writs should have been sustained.

For it is clear that where the jurisdiction to order removal is based upon an indictment alone, the removal may not be ordered unless the indictment sets forth facts constituting a crime.

> "He" (the District Judge) "must look into the indictment to ascertain *whether an offense against the United States is charged*" (not, it is to be observed, to see whether an offense is *attempted* to be charged or *purports* to be charged) "find whether there was probable cause and determine whether the court to which the accused

is sought to be removed has jurisdiction of the same."

Tinsley *v.* Treat, 205 U. S., 20, at 29.

And in discussing the extent to which a successful attack upon the indictment would be fatal to jurisdiction in removal proceedings, the Court, reviewing its prior decisions and particularly that in Greene *v.* Henkel, said:

> "But it was insisted that the offense was only that which was contained in the indictment, and if the indictment were insufficient for *any* reason that then no offense was charged upon which removal could be had. This court, however, ruled that the indictment did not *preclude* the Government from giving evidence of a certain and definite character concerning the commission of the offense, and that the mere fact that there might be lacking in the indictment some averment of time or place or circumstance in order to render it free from technical defects would not prevent the removal *if* evidence were given on the hearing which supplied such defects and showed probable cause to believe the defendants guilty of the offense defectively stated in the indictment. Mr. Justice Peckham, in delivering the opinion, was careful to say that it was not held that where the indictment charges no offense against the United States, or the evidence failed to show any, or, if it appeared that the offense charged was not committed or triable in the district to which the removal was sought, the Judge would be justified in ordering the removal, *because there would be no jurisdiction to commit or any to order the*

> *removal of the prisoner.* 'There must be some competent evidence to show that an offense has been committed over which the court in the other district had jurisdiction, and that the defendant is the individual named in the charge, and that there is probable cause for believing him guilty of the offense charged.'"
>
> Tinsley *v.* Treat, 205 U. S., 20, at 30, 31.

In Greene *v.* Henkel, 183 U. S., 249, where the removal had been ordered not only upon the proof afforded by the indictment, but upon oral testimony taken before the District Court, and that testimony was *not* brought before the court in the *habeas corpus* proceedings, it was held that the oral proof must be presumed to have remedied any defects in the evidence afforded by the indictment, but great care was taken to point out that where an indictment failed to state a crime, and there was no *other* proof of its commission, there would be no jurisdiction to remove, saying:

> "*We do not, however, hold that when an indictment charges no offense against the laws of the United States and the evidence given fails to show any*, or if it appear that the offense charged was not committed or triable in the district to which the removal is sought, *the Court would be justified in ordering the removal*, and thus subjecting the defendant to the necessity of making such a defense in the court where the indictment was found. *In that case there would be no jurisdiction to commit, nor any to order the removal of the prisoner*" (p. 261).

Obviously, therefore, the rule as thus authoritatively laid down, is this: In a removal proceedings, an indict-

ment is to be taken as proof of the *facts* which it alleges. If it set forth facts sufficient to constitute a crime, it suffices *of itself* as proof of probable cause; if it omits any facts essential to that end, the omission may be supposed *aliunde*, and if so supplied—since the deficiency of the indictment as a pleading in no way impairs its effectiveness as proof of that which it does allege—the completed proof thus furnished will justify a removal. On the other hand, if it does not set forth facts sufficient to constitute a crime, and no such proof is produced *aliunde*, the Commissioner is without jurisdiction to detain the accused, not because the indictment is defective as a pleading, but because the case before him is devoid of proof.

Accordingly, in removal proceedings, it has been the almost uniform practice of the Court to examine the indictment for the purpose of determining whether the facts alleged therein establish a crime (see U. S. *v.* Green, 136 Fed., 618, at 660; U. S. *v.* Black, 160 Fed., 432, at 433, 434 (C. C. A., 7th); Pereles *v.* Weil, 157 Fed., 419, at 421; Stewart *v.* U. S., 119 Fed., 89, 93 (C. C. A., 8th); U. S. *v.* Connors, 111 Fed., 734; *In re* Belknap, 96 Fed., 614, 615; United States *v.* Lee, 84 Fed., 626, 627; *In re* Dana, 68 Fed., 886, 890; *In re* Corning, 51 Fed., 205, 206; *In re* Terrel, 51 Fed., 213, 214 (Lacombe, *J.*); *In re* Greene, 52 Fed., 104, 106 (Jackson, *J.*); *In re* Buell, 3 Dillon, 116, 120 (Dillon, *J.*); *In re* Doig, 4 Fed., 194).

The only decision which runs at all counter either to these authorities, or to the logic on which they are based, is that in *Benson* v. *Henkel*, 198 U. S., 1, where,

in the opinion of Mr. Justice Brown, language is employed which might be construed to preclude the District Court from examining the indictment at all for the purpose of determining its sufficiency as evidence of probable cause, if it appeared on the face of the indictment that a crime was *attempted* to be charged.

As to the decision in this case it is to be observed, however,

1. That the authorities cited by Mr. Justice Brown in support of his conclusions are chiefly derived from interstate rendition cases, where the requirement is merely that there shall be a *charge* of crime, not "probable cause"; or from prohibition cases where nothing is required but jurisdiction of the person and power to inquire into the subject matter.

2. That apparently these conclusions were not necessary to the decision, since all the members of the Court seem to have been of the opinion that the indictment *was* sufficient.

3. That these conclusions were concurred in by a bare majority of the Court (if their silence is to be taken as evidence of concurrence in matter not necessary to the decision), and that four of the justices who concurred in the result filed a memorandum reasserting the doctrine as laid down in *Greene* v. *Henkel*, *supra*.

4. That the conclusions therein expressed by Mr. Justice Brown have been repudiated in *Tinsley* v. *Treat*, wherein the Court was at pains again to point out that to confer jurisdiction in removal proceedings, there must be proof of the commission of a crime either through the facts alleged in the indictment, or *aliunde*.

5. That apparently three of the four justices who are recorded as concurring with Mr. Justice Brown in *Benson* v. *Henkel*, did not construe his language as implying anything at variance with the doctrine of *Greene* v. *Henkel*, for the opinion in *Tinsley* v. *Treat*, which was written by the Chief Justice, and concurred in by Mr. Justice Brewer and Mr. Justice Holmes, as well as by the four justices who had expressly dissented from the opinion in *Benson* v. *Henkel*, reasserts the doctrine of *Greene* v. *Henkel*, in language even more explicit than the original statement of it, and approves, among others, the decision of Judge Jackson, 52 Federal, 104, that the "liberty of the citizen and his general right to be tried in a tribunal or forum of his own domicil imposes upon the judge the duty of considering and passing upon those questions" (p. 29).

Furthermore, we conceive that every consideration of that fundamental public policy to which Mr. Justice Jackson refers lends weight to the logic and authority which require that there shall not be a removal save where an indictment alleges a crime, or proof of crime is made *aliunde*. For, as this Court has keenly appreciated, there are risks and burdens attending removals which ought not needlessly be cast upon any individual, and in controversies between the Government and the individual, the individual is entitled to reasonable protection (*Beavers* v. *Henkel*, 194 U. S., 73, 83; *Tinsley* v. *Treat*, 205 U. S., 20, 29, and 30); and surely the least that may be demanded as reasonable protection is that he shall not be transported to a

foreign district unless there shall be some proof that in that district he has committed a crime.

It may be that where an indictment sets forth facts constituting a crime, no undue hardship is involved in directing such transportation even though the indictment be in some technical respect insufficient, because, under those circumstances, and especially if the technical omission be supplied *aliunde*, there is in such case proof that the accused has committed an offense, and it may be presumed that the defective indictment will be superseded by a valid one, and the removal will not be an idle hardship. But where the indictment does not allege fact sufficient to constitute a crime, and he therefore stands accused of no offense, and, there is no ground to believe that he has committed an offense, to remove a defendant to a distant district in order to have there declared, by the same system of courts as presides over his home district, that which those courts are equally competent to declare, namely, that he is not accused of any acts for which he may lawfully be detained, is to impose a useless hardship, and to sanction a procedure entirely at variance with the genius of our institutions.

We conceive, therefore, that we may assume the law to be that which in *Tinsley* v. *Treat* it is declared to be, and that in the case at bar—since there is no proof save that furnished by the indictments—if the facts which appear therein do not prove the commission of a crime, the Commissioner was without jurisdiction to remove.

Hence, it becomes necessary to examine the in

dictments for the purpose of ascertaining whether by either of them, any crime is charged.

Upon such an examination, it becomes clear that in no count is there set forth any agreement which contemplated either a fraud upon the United States or the commission of any offense against the United States, or even a violation of any duty imposed upon the Associate Statistician by the rules or regulation of the department, or otherwise.

The defect inheres in the nature of the agreement which the indictments characterize as a conspiracy, and, hence, concerns the very gist of the charge.

The point is that in no one of the counts is it charged that Holmes, the Associate Statistician, was to be induced to do anything which it was in any manner forbidden that he should do. To an appreciation of the more extended demonstration of this proposition which follows, a brief summary of the indictments and of the specific contention to be made under each class of counts may prove useful.

The two indictments contain seven counts,[1] each charging conspiracy as the crime. The five counts of indictment 26,088 charge the conspiracy as a conspiracy to defraud the United States. The two counts of indictment 26,089 charge the conspiracy as a conspiracy to offer and give a bribe to an officer of the United States or a person performing an official function under a department of the United States Government, *to do an act in violation of his official duty.*

[1] There are actually ten counts, but counts 4, 6 and 8 of indictment 26,088 were abandoned, and are not in evidence or otherwise before the Court (see p. 16).

The counts that charge a conspiracy to defraud the United States predicate wrongdoing either, 1, upon an agreement to bring about a disclosure to the appellant and his codefendant of certain information relating to the cotton crop reports issued by the Department of Agriculture; or, 2, upon an agreement that the report to be issued should be based upon information other than that to be derived from departmental sources. The counts that charge a conspiracy to bribe the official to do an act in violation of his duty set forth the same agreements, with the additional element that a sum of money was to be offered to the Assistant Statistician to induce him to bring about this disclosure or to procure the report to be based upon information other than that derived from departmental sources.

The gist of the offense in each of these classes is the agreement to procure what is claimed to be a violation of duty.

If no violation of duty was involved in any of the acts contemplated by these agreements the indictments charge no crime.

The contentions with regard to these charges are as follows:

The counts of the first and second class are defective in this: that they charge a conspiracy to *defraud the United States* based upon acts which, even if they constituted a violation of duty, could not be brought within the definition of "defrauding."

The counts of the first class are defective in this: that they do not charge the persons to whom it was

intended the disclosure should be made were persons who would not be authorized to be informed of the facts, and, therefore, do not charge that there was contemplated any violation of duty in that respect.

The counts of the second class are defective in this: that they do not charge that it was required that the reports should be based upon information to be derived from departmental sources, or that any inaccuracy in the report was to be brought about by the conspirators which was anything more than such as might result from an honest mistake of judgment, and that there is no charge that it was designed to procure the report to be anything other than that which the person making it and all the other parties to the alleged conspiracy *honestly believed to be* an accurate estimate, and hence that therein there was no attempt to procure any violation of the rules, regulations and practices of the department.

The counts of the third class are defective in this: That they charge a conspiracy to pay money to induce the violations of duty described in the counts of the first and second class, and if those acts do *not* constitute violations of duty the charge attempted to be made therein, namely, a conspiracy to bribe a person performing an official function *to do an act in violation of his duty* is manifestly *not* maintained.

All the counts are defective in this, that the acts to which they relate were not acts to be performed by Holmes in an *official* capacity.

These objections we purpose to elaborate separately.

A.

The conspiracies set forth in indictment numbered 26,088 contemplated no acts tending to defraud the United States or constituting an offense against the United States, and hence that indictment charges no crime and furnishes no basis of jurisdiction for detention in removal proceedings.

Section 5440 of the revised statutes penalizes two classes of conspiracies:

1. Conspiracies *to commit an offense* against the United States.

2. Conspiracies *to defraud* the United States in any manner or for any purpose.

It is settled that conspiracies of the first class embrace those only that have for their object the commission of a crime.

U. S. *v.* Payne, 22 Fed., 426, at 427;

Thomas *v.* U. S., 156 Fed., 897, at 901.

And as the criminal laws of the United States contained no statute which made malfeasance or misfeasance in office an offense, and no statute which forbade and rendered criminal the particular acts of alleged malfeasance which are set forth as the object of these conspiracies, it is clear that those acts cannot be brought within the definition of conspiracies *to commit an offense* against the United States.

The Government has therefore sought to bring the acts within the scope of the section by charging that the alleged agreements constituted conspiracies *to*

defraud the United States, and, realizing that a charge of fraud requires an object of which the victim of the fraud is to be deprived, have disclosed their theory in that regard by charging that the United States was to be defrauded of "its governmental function in the matter of issuing and publishing the cotton crop reports . . . and of its right to administer an intelligent and honest service in that behalf, in the interest of the people of the United States."

The contention of the Government apparently is, that the term "to defraud," as employed in this statute, is to be construed as including within its scope all forms of malfeasance in office, and all other wrongs which may be perpetrated against the Government.

It is difficult to see what warrant can be found for such an enlargement of the scope of a well understood and clearly restricted legal term.

Certainly it is unquestioned that "to defraud," in its ordinary interpretation, means, to deprive of some property or interest or right therein by deceitful practice; that it involves necessarily a property right as the objective, and practices involving misrepresentation or some other form of deceit as the means to be employed to secure it.

These propositions are well settled.

a.

In order to constitute a fraud, some property or right or interest therein must be sought.

"Fraud in a general sense is the *deceitful* unlawful "appropriation of the *property* of another."

Wharton's Crim. Law., 10th Ed., Sec. 124.

"Actual or positive fraud consist in the *deception* "practised in order to induce another *to part with prop-* "*erty* or *to surrender some legal right* and which ac- "complishes the end designated."

Cooley on Torts, 2nd Ed., 555;

And see

Burdick *v.* Post, 12 Barb., 168, 186;

U. S. *v.* Lee, 12 Fed., 816, 819.

Furthermore the right must be real and tangible, and not remote or fanciful.

In Bradley *v.* Fuller, 118 Mass., 239, the action was founded upon fraudulent misrepresentation made for the purpose of inducing a creditor not to take immediate legal action against a corporation for the collection of his debt, and which had been effective for that purpose.

The Court held that that of which the plaintiff claimed to be defrauded was too "*remote, indefinite and contingent*" and that the action would not lie, saying:

"Taking these counts in the most favorable sense "for the plaintiff they simply charge that the plaintiff, "induced by the falsehood alleged, refrained ftom carry- "ing into effect an intent to attach. * * * It must "necessarily be uncertain whether the plaintiff would "have attached the property and applied it to the "payment of his debt, if the alleged representation had "not been made."

Even where the deception induces the abandonment of a formulated intention it affords no basis for a cause of action, and as was said in another Massachusetts case, an intention "*is not property, and the abandonment of such an intention is not a loss of property.*"

Dudley *v.* Briggs, 141 Mass., 582, 585.

b.

In order to constitute a fraud there must be a resort to deceptive practices.

"Fraud means an intention to deceive."

Lord *v.* Goddard, 13 Howard, 198, at 211;

And see:

Union Pacific Co. *v.* Barnes, 64 Fed., 80, at p. 83.

c.

The acts charged in the indictment conform to neither of these requirements.

No property right, or other kindred right or interest is involved. This seems too plain to require any argument.

By the acts charged the United States was to lose nothing, and was to be subjected to no liability or possibility of liability or loss.

And this is equally true of both branches of the conspiracy.

The learned judge who decided the case below was of the opinion that there was no element of fraud in the premature disclosure of the reports, but that fraud could be found in the acts whereby it was charged that they were to be rendered inaccurate; and he likened the case to one in which wreckers had planted buoys so as to confuse navigators in negotiating the channels of a harbor (Haas *v.* Henkel, 166 Fed., 621, at 626).

It is submitted that this distinction loses sight of one controlling element in the crime, namely, that the con-

spiracy must be a conspiracy to defraud *the United States.*

A conspiracy such as the learned judge suggested might possibly constitute a conspiracy to defraud the prospective navigators, but like the conspiracy here under consideration, could not defraud the United States.

The distinction has been emphasized by this Court.

Cross *vs.* North Carolina, 132 U. S., at 139.

It was there contended that the forgery of a promissory note by the president of a national banking association for the conceded purpose of supporting false entries in its books, and *with intent to deceive the national bank examiner was an offense against the United States,* under Section 5418 of the U. S. Revised Statutes, which makes it a crime "to forge any bid, proposal . . . or other writing, for the purpose of defrauding the United States."

But this Court held that:

> "The false making or forgery of promissory
> "notes or other securities, purporting to be exe-
> "cuted by individuals, and made payable to or
> "at a national banking association, may be in
> "fraud of the bank or its stockholders, but it is
> "not in itself, or within the meaning of that sec-
> "tion, a fraud upon the United States."

d.

The conspiracy did not contemplate any deceitful practices as a means of attaining its ends.

There is nothing in the indictment to suggest either that the disclosure of the contents of the report or the alteration thereof was to be clandestine. For all that

appears, Holmes was to announce the contents of the report to Price and Haas openly in the presence of the Secretary of Agriculture and in defiance of his authority, and was in like manner to secure the alteration of its figures.

Plainly, while this might constitute insubordination, or malfeasance, it cannot constitute fraud.

e.

A consideration of the history of federal legislation upon the subject of conspiracies, frauds and other injurious acts leads inevitably to the same conclusion.

Section 5440 had its origin in the act of March 2, 1867, Ch. 169, Sec. 30, which had to do with the revenue laws and was codified in the revised statutes without substantial change.[1]

Certainly when that act was enacted it was not conceived as a blanket enactment covering all conspiracies to inflict wrongs upon the federal government, for there were then five special conspiracy statutes in force which remained unrepealed: (1) the act of 1825, denouncing a conspiracy to cast away a vessel; (2) the act of 1861, dealing with a conspiracy to overthrow the government or forcibly to oppose its authority; (3) another act of 1861, dealing with conspiracy to prevent holding office under the United States; (4) the act of 1863, dealing with conspiracy by a soldier or sailor to defraud the United States by a false claim; (5) the act of 1863,

[1] The act of 1867 read "to defraud the United States in any manner whatever." In the Revised Statutes it was changed to read "to defraud the United States in any manner and for any purpose."

dealing with conspiracy by persons not in the military or naval service to defraud the United States by a false claim in connection with one or other of those services. Each of these acts provided its own penalty, and the penalties differed in the different acts, and differed from that provided in the act of 1867—the original of Section 5440.

Subsequent to 1867 three other conspiracy statutes were passed: (1) the act of 1868, dealing with conspiracies by revenue officers to defraud the United States, imposed a different penalty from that applied to the conspiracies covered by the act of 1867. Another adopted in 1870, dealt with a conspiracy to injure another in the exercise of a right or privilege secured by the Constitution or laws of the United States. The third, in 1871, added to the offenses covered by the act of 1861, a number of other offenses in the form of conspiracies to interfere with a party, witnesses or juror in a suit, to deprive of the equal protection of the laws, to obstruct the course of justice, and to prevent the support of a candidate. None of these statutes has been repealed and all were included in the revised statutes (see Sections 5364, 5518, 5536, 1342, 1624, 5438, 3490, 3169, 5508, 5406, 5407, 5519, 5520).

Manifestly, therefore, Congress has distinguished in its legislation between conspiracies "to defraud the United States" and conspiracies to commit other wrongs against the United States, and has provided against conspiracies to defraud by one series of statutes, apportioning the penalty in accordance with its conception of the gravity of the fraud, and has pro

vided for conspiracies to inflict such other injuries of a non-fraudulent nature, as it deemed should be subjected to punishment, by *other special statutes*, and it has not included among those other injuries those resulting from malfeasance in office.

A further indication of recognition by Congress of the limitations to be imposed upon the term "defraud" is to be found in the phraseology of the section of the banking act which deals with "fraud" and *other* acts of misconduct on the part of bank officers (R. S., Section 5209).

That section, so far as material, reads as follows: "Every president, director, cashier, etc., . . . who makes any false entry in any book, report or statement of the association with intent in either case *to injure or defraud* the association or any other company, *body politic* or corporate, or any individual person or *to deceive* any officer of the association, or any agent appointed to examine the affairs of the association," &c.

Thus Congress evidently realized, that "to defraud," meant to deprive of a property right and that even a false entry made with intend to mislead a bank examiner with regard to the conditions of the bank could not appropriately be described as an entry made with intend to *defraud* and could be brought within the scope of the statute only by describing it in appropriate terms as an entry made with intent to deceive; and that the term "to defraud" was applicable to a limited class of wrongful acts only; that it was not the equivalent of "to injure" and not even the equivalent of "*to deceive*."

Clearly, therefore, a conspiracy to procure an act of malfeasance in office cannot be included within the scope of the statute providing against conspiracies "to defraud," unless the term "to defraud" shall be held by association with the words "the United States" to have undergone a chemical mutation.

No one would pretend that, under a statute which made it criminal to defraud an individual, an employee who had been neglectful of his employer's interest or property, or had violated his employer's instructions as to maintaining secrecy with respect to the condition of his employer's business, could be said to be guilty of the crime.

Certainly, under such a statute an employee who did nothing more than to concoct and give forth a false statement of his employer's financial condition would not be guilty of defrauding *his employer*.

People *ex rel.* Hegeman *vs.* Corrigan, 195 N. Y., 1, at p. 15.

And even though the false statement were given out for the purpose of deceiving and defrauding other persons—as for instance, if a managing officer of a corporation were to publish a false statement of its financial condition for the purpose of inducing a third person to buy of him its shares of stock at an enhanced price—while he would be clearly guilty of defrauding the purchaser, he certainly would *not* be chargeable with defrauding *the corporation*.

Yet a private employer has as clear a right to faithful service, and as clear a right to have its

affairs conducted honestly, as has the government itself, and it is difficult to see how an act which would *not* constitute a fraud upon a private employer, can be converted into a fraud merely by reason of the fact that the employer is the United States.

There are, however, decisions of the lower courts which are adverse to the conclusions for which we are here contending, in which it has been held that the word "defraud" is to be construed in its "equitable sense," and to include any wilful act that works a wrong to the United States. Such, for instance, are Tyner *v.* U. S., 23 App. Cas., D. C., 324; U. S. *v.* Stone, 135 Fed., 392; Palmer *v.* Colladay, 18 App. Cas., 446; U. S. *v.* Morse, 161 Fed., 429; and perhaps, U. S. *v.* Bunting, 82 Fed., 883; and U. S. *v.* Curley, 130 Fed., 1. Some of these may be distinguished from the case at bar by the fact that the acts contemplated involved deceitful practices, and that the ultimate object of the conspiracies was to deprive the government of money or property rights.

Such, for instance, are *U. S.* v. *Bunting* and *Curley* v. *U. S.*, *supra*, which involve similar facts. In the latter the indictment alleged a conspiracy between Curley and one Hughes, who desired to obtain an appointment as letter carrier, whereby Curley was to falsely impersonate Hughes at a Civil Service Examination, take the examination, and sign Hughes' name to the papers.

The charge was framed under Section 5440, and also under Section 5418, which makes it a crime to present

certain false papers for the purpose of defrauding the United States.

The Court, in determining that these acts constituted a fraud upon the United States within the meaning of these statutes, though it elaborated an argument to establish that the term "to defraud" might be held to apply to any deception which tended to impair the efficiency of the administration of a governmental service, pointed out that in the final analysis a property right was involved, and that its decision might rest upon the circumstance that the ultimate object of the conspiracy was the salary attached to the office (see Opinion, 130 Fed. Rep., p. 12).

But other decisions like that in Tyner *v.* U. S.; U. S. *v.* Stone; Palmer *v.* Colladay; and U. S. *v.* Morse, above referred to, cannot be thus distinguished, since the rulings in those cases can be sustained only on the theory that conspiracies to mislead Federal officials in the performance of their functions (U. S. *v.* Morse, and U. S. *v.* Stone) and conspiracies to induce Federal officials to commit malfeasance in office in a manner which does not affect property rights (Tyner *v.* U. S.) constitute conspiracy to defraud the United States.

Thus, in U. S. *v.* Stone, 135 Fed., 302, the charge was that a manufacturer of life belts, which were required by the Federal regulations to be made of cork and to weigh six pounds, had inserted bars of iron weighing one-half pound each in blocks of cork weighing five and a half pounds, with the intent of enabling the purchasers of those belts to deceive the officers appointed to inspect them. There was no design to sell the belts to the

Federal Government, and the deceit affected the Government only by enabling the ship owners to pass inspection with an inferior article. Nevertheless, it was held that this constituted a conspiracy to defraud the United States.

And, in Tyner *v.* U. S., the conspiracy was to procure Tyner, an assistant attorney in the Post Office Department and an officer of the Department, to violate his official duty[1] in a manner which in no way affected the property of the Government and affected it merely by impairing the administration of the Governmental functions. Nevertheless, the Court held that it constituted a conspiracy to defraud.

Out of these decisions there has arisen a serious and irreconcilable conflict in the courts below as to what constitutes a conspiracy to defraud the United States. Judge Hough, following his own decision in the Morse case, which was based primarily on the decision in the Curley case, has held that they all do (Haas *v.* Henkle, 163 Fed., 908[2]). Judge Ward has held, as we have stated above, that it was a fraud to render the reports inaccurate, and was not a fraud to disclose their contents (166 Fed., 621). Judge Holt, whose decision was based upon indictments against Haas, found in 1905, charging only a conspiracy to disclose prematurely, held that this was *not* a fraud upon the United States (166 Fed., 211).

In this Court, the question has never been decided.

[1] By failing to report his conclusions upon schemes for the use of the mails for fraudulent purposes.

[2] On the trial Morse was acquitted on all the conspiracy counts.

and so far as we know, has never been presented, for in every case of which we are cognizant, wherein the sufficiency of a charge of conspiracy to defraud the United States has been before this Court, the conspiracy has involved an attempt to secure the lands of the United States by deceptive practice (as in Hyde *v.* Shine, 199 U. S., 76; U. S. *v.* Keitel, 211 U. S., 370), or to secure its moneys by like means (as in Crawford *v.* U. S., 213 U. S., 183; U. S. *v.* Hirsch, 100 U. S., 33; Beavers *v.* Henkle, 194 U. S., 73). In some of these cases, it was urged that the full value of the land was being paid or that the material to be supplied to the United States was a complete *quid pro quo* for the money to be got, and that hence, no property right was involved and no fraud committed, and naturally the contention was overruled. This, so far as we know, is the nearest approach to a presentation to this Court of the questions here involved.

We conceive, therefore, that in this Court the question is to be determined upon sound principles of interpretation unembarrassed by controlling authorities, and uninfluenced by the opinions of the lower courts, save as their reasoning may commend itself to this Court.

To the reasoning of those opinions, we conceive it a sufficient answer to say that Congress is presumed to legislate with an understanding of the legal significance of the terms it employs; that especially in a statute creating a crime it will be presumed to specify clearly the class of acts which it intends to bring within the scope of its condemnation; that if it had intended to render criminal conspiracies to induce misconduct in

Federal office, or more broadly, to include conspiracies to do any act which tended to the prejudice of the Federal Government, it is inconceivable that it would not have expressed that intention in terms that were reasonably appropriate; and it is inconceivable that it would have specified a particular and limited class of wrongs as the subject of its condemnation, if it had intended to embrace therein all wrongs of every nature and description.

It may be deplorable that *conspiracies* to induce misconduct in office are not punishable under the Federal laws. It is deplorable that Congress has not sought to protect the Federal service by enacting in regard to it the provisions which at the common law, and under the statutes of nearly all the States, make official malfeasance or nonfeasance themselves criminal.

But the remedy in the one case or in the other lies in the Legislature, not in the courts.

B.

In the counts based upon the agreement to disclose the contents of the reports there is no allegation that the persons to whom it was contemplated that the disclosures were to be made would be persons unauthorized to receive the information and hence no charge of an agreement that contemplated any wrongdoing.

The point which we are here making may be summarized as follows:

1. The conspiracy attempted to be set forth is a con-

spiracy to cause certain information to be disclosed to *unauthorized* persons. (Indictment 26,088, counts 1, 2, 3, 5 & 7, pp. 114; 120; 122; 127; 133.)

2. It is *not* charged that the persons to whom the information was to be given were to be unauthorized to receive it.

3. Hence, the indictment is defective in that it affords no proof of the one essential fact which is determinative of the guilt or innocence of the act charged, *i. e.*, no proof of that which constitutes the gravamen of the offense.

It is as though in support of a charge of incest, it were to be proved merely that "A" had intermarried with and sustained sexual relations with "B," and no proof were offered to establish that "A" and "B" were related within the prohibited degrees.

Manifestly, this is a fatal defect of proof, and a defect which renders it "obvious on inspection" that the indictments sets forth no crime.

It remains, therefore, only to set out for the convenience of the Court the allegations of the indictment through which the absence of proof is made manifest.

The allegations of the indictment.

For the purposes of this discussion it will not be necessary for the Court to examine critically all of the various counts of the indictments, since in so far as this question is concerned, they are all (except in one aspect, which will be treated hereafter[1]) identical, and a discussion of one of the counts will serve for all.

[1] See subdivision 1 of this point, p. 96.

In considering this question, therefore, we shall ask the Court to address itself to Count No. 2 of Indictment No. 26,088 (pp. 116–121).

An examination of that count will disclose that the allegations upon which the charge of conspiracy must stand or fall—namely, the allegations of that which the rules and regulations prescribed and forbade, and of that which the appellant and his co-defendant conspired to do are as follows:

The rules and regulations.

> "That during the time and times aforesaid a custom and practice prevailed in the said Department of Agriculture, established and sanctioned by the said secretary, under which the giving out *to the public* of any information collected by the said Bureau of Statistics or its said officers or its said employees, to be used in the preparation of or to be contained therein of any of said crop reports, was prohibited and the keeping of such information secret was required, except such information as was contained in said crop reports when and after the same had been officially issued and published" (pp. 117, 140).

To which may be added to the following:

> "And that during the time and times aforesaid the said statistician and associate statistician and the other officers and employees aforesaid of the said Bureau of Statistics were charged with the duty of honestly and carefully guarding and keeping secret and *of not divulging to any person not employed in or connected with said Bureau of Statistics*, any information acquired by him or them in the course of preparing and assisting in preparing the said crop re-

ports and in collecting statistics and compiling statistical matter for use in the preparation of said crop reports, or any of the matters and things and other information which might be contained in any of said crop reports until said crop reports had been prepared, officially approved and issued and published as aforesaid; and thereafter said duty of so maintaining secrecy as aforesaid continued, save and except as to the matters and things so officially made public in said reports" (pp. 118, 119, 140),

and the following:

"that under the practice, custom and regulation of the said department established and sanctioned by the said Secretary of Agriculture, no officer or employee thereof to whom such information might come by reason of his employment, has been permitted to issue, publish or divulge *to unauthorized persons*, and all such officers and employees have been prohibited from issuing, publishing or divulging to unauthorized persons, any such information so acquired as aforesaid, or any such cotton-crop report, or any information indicating the probable contents or character of the same, in advance of its official issuance and publication, or without its first being submitted to and officially approved by the said Secretary" (pp. 113, 114).

The Allegations of the Conspiracy:

" . . . The said Edwin S. Holmes, Junior, Theodore H. Price and Moses Haas, unlawfully, corruptly and fraudulently did conspire, combine, confederate and agree together with certain other persons to the grand jurors aforesaid unknown, to defraud the United States in

the dishonest and corrupt manner and through and by means of the dishonest and corrupt scheme and arrangement following, that is to say: That in violation of the said duty of him, the said Edwin S. Holmes, Junior, as such associate statistician honestly and carefully to keep secret all statistics and statistical matter and information, knowledge of which was acquired by him as aforesaid as such associate statistician, and in advance of the official issuance and publication of each of said cotton crop reports, as hereinbefore set forth, and in advance of the time or times when the matter and information contained in each of said cotton crop reports could lawfully be made public, and to prevent, obstruct and impair the due and orderly administration of the business and affairs of said Department of Agriculture, and to the prejudice of the said United States, he, the said Edwin S. Holmes, Junior, should and would thereafter in so far as in him the power lay, furnish *to the said Moses Haas and to the said Theodore H. Price* the statistics and matter and information which were to be contained in each of said cotton crop reports, knowledge of which was as aforesaid, acquired by the said Edwin S. Holmes, Junior, in the performance of his duty as such associate statistician" (pp. 119, 120).

Obviously, when this is stripped of its verbiage and when there is eliminated from it that which constitutes merely the prosecutor's conclusions of law, and thus constitutes no part of that whereby the sufficiency of the allegations is to be tested, it reduces itself to this and this only—namely: that Holmes, Price and Haas

agreed that Holmes was to furnish to *Price and Haas* in advance of the official publication of the report the statistics and information which were to be contained in the said reports, knowledge of which he had acquired in his official capacity.

AND THERE IS NO ALLEGATION THAT MR. PRICE OR MR. HAAS WERE "UNAUTHORIZED" PERSONS, OR PERSONS "NOT EMPLOYED IN OR CONNECTED WITH SAID BUREAU OF STATISTICS," OR FOR ANY OTHER REASON PERSONS TO WHOM IT WAS FORBIDDEN TO REVEAL THE INFORMATION IN QUESTION; NOR IS THERE ANY ALLEGATION THAT THE ALLEGED CONSPIRACY CONTEMPLATED THAT AT THE TIME WHEN THE REVELATIONS WERE TO BE MADE, MR. PRICE AND MR. HAAS WOULD BE PERSONS TO WHOM, FOR ANY REASON, IT WOULD BE FORBIDDEN TO COMMUNICATE THE INFORMATION.

It is established by the evidence that there were some 200,000 persons connected with this Bureau in one form or another, and that its personnel was constantly shifting (pp. 84 and 92), and further, that within the regulations of the department, persons not connected with it might and from time to time were authorized to receive the information in advance of its official publication (see *infra*, p. 108).

Unless the agreement made by Mr. Price, Mr. Haas and Mr. Holmes contemplated that when the revelation was to be made Mr. Price and Mr. Haas would not be included among the vast number of those who were connected with the department, and would not be otherwise authorized to receive the information, it would manifestly be a perfectly lawful and proper agreement.

And hence, in order to impute any wrong to the agreement set forth in the indictment, the Court would be compelled to *assume*, without the shadow of proof, that Mr. Holmes, Mr. Haas, and Mr. Price contemplated a condition which would render wrongful acts which, in the absence of that condition, they were perfectly entitled to perform.

In other words, in order to sustain this removal proceeding, the Court is asked to substitute a presumption of guilt for the presumption of innocence, to hold that in criminal cases inferences may supply the place of proof, and that that which the Grand Jury did not charge, and which is in no other way established, a Court may assume to be true in order to spell out a crime.

Certainly in the light of the authorities, such a contention would seem little short of ridiculous.

"All the material facts and circumstances embraced in the definition of the offense must be stated and that if any essential element of the crime is omitted such omission can not be supplied by intendment or implication."

Pettibone *v.* U. S., 148 U. S., 197, at 202;
U. S. *v.* Hess, 124 U. S., 483, at 486.

And it is settled also that if the facts averred or proved in a criminal case be susceptible to two interpretations—one pointing to innocence and the other to guilt—the innocent interpretation *must* be adopted and the charge or proof of crime must be held to have failed.

The Bothnea and *The Johnstaff*, 2 Wheat., 169, 177;

U. S. *v.* Simmons, 96 U. S., 360, 363;
Blitz *v.* U. S., 150 U. S., 308, 313.

In *The Bothnea* and *The Johnstaff*, 2 Wheat., 169, the question was whether or not the capture of the vessels by a privateer had been collusive. The Court said (p. 177):

> "That the voyages of these vessels was loaded with infamy no one pretends to deny. . . . But the majority of this Court are of opinion that the evidence is not sufficient to fasten on the captors a participation in the fraud. The whole may have been, for aught we know, a combination of machinery, the result of the most consummate art. It is certain that in one view of the case everything may be attributed to artifice, in another to natural conduct. Scarcely a feature of it may not be indifferently pronounced the lineament of guilt or innocence. In such a case a Court of Justice has no alternative. *It must pronounce in favor of innocence.*"

And the lengths to which this principle will be carried is well illustrated by the decisions of this court in *U. S.* v. *Simmons*, and *Blitz* v. *U. S.*, (*supra*).

In the *Simmons* case the statute under which the indictment was drawn, namely, Section 3266 of the Revised Statutes, provided as follows:

> "Sec. 3266. No person shall use any still,
> " boiler or other vessel for the purpose of dis-
> " tilling in any dwelling house or in any shed,
> " yard or enclosure connected with any dwelling
> " house, or on board of any vessel or in any build-
> " ing or on any premises where beer, lager beer,
> " ale, porter or other fermented liquors, vinegar
> " or ether, are manufactured or produced."

The indictment charged that the defendant

> " did knowingly and unlawfully cause and procure
> " to be used, a still, boiler and o her vessel for
> " the purpose of distilling within the intent and
> " meaning of the internal revenue law of the
> " United States, in a certain building and on
> " certain premises where vinegar was manufac-
> " tured and produced against the peace of the
> " United States and their dignity, and against
> " the form of the statute of the said United
> " States in such case made and provided."

The count was held fatally defective on the ground that while the indictment averred that the defendant had caused a still and boiler and other vessels for the purpose of distilling to be used in a certain building where vinegar was manufactured and produced, it did not charge that vinegar was being manufactured and produced in that building *at that time*, the Court saying:

> " Nor does it sufficiently appear that vinegar
> " was manufactured or produced in the building
> " on the premises referred to *at the time* the still
> " and other vessels were used for the purpose of
> " distilling. *It is consistent with the averments*
> " that vinegar had been manufactured or pro-
> " duced long prior to the date when the alleged
> " distilling occurred. The two facts must co-
> " exist in order to constitute the offense de-
> " scribed in the statute " (p. 363).

And in Blitz *v.* U. S., 153 U. S., 308, the indictment was found under a *statute* which provided:

> " If at any election for a representative or
> " delegates in congress any person knowingly
> " personates and votes, or attempts to vote in

" the name of any other person . . . he
" shall be punished by a fine of not more than five
" hundred dollars or by imprisonment for not
" more than three years," etc.

The *indictment* alleged

" that on the 8th day of November, A. D., 1892,
" at Kansas City, in the County of Jackson,
" State of Missouri, there was then and there an
" *election*, duly and in due form of law, had and
" held, *for choice of representative in the congress*
" of the United States, which said place afore-
" said was then and there a portion of the Fifth
" Congressional District of Missouri.

" And the grand jurors aforesaid, upon
" their oaths aforesaid, do further find and pre-
" sent that at the said election, one Morris Blitz
" did then and there unlawfully, falsely, know-
" ingly, and feloniously personate and vote and
" attempt to vote in the name of another person
" other than his own name, to these grand
" jurors unknown, contrary to the form of the
" statute in such cases made and provided, and
" against the peace and dignity of the United
" States."

The Court held this count fatally defective, saying:

" The first count charged that the defendant,
" knowingly personated and voted and attempted
" to vote in the name of another person to the
" grand jurors unknown at an election, had and
" held for choice of Representative in Congress
" of the United States. But that was not, *except*
" *by inference*, a charge that the defendant in
" fact voted for Representative in Congress.
" *He may have* voted only for State officers, and
" yet it could be said, not unreasonably, that he

" voted at an election had and held for Repre-
" sentative in Congress " (p. 313).

Surely, in the light of these authorities, it would seem idle for the Government to contend that a court, in order to sustain a criminal charge, will assume without proof the very fact which constitutes the gravamen of the offense.

It remains, therefore, only to consider the objections that may be urged in opposition to these views.

I.

THE FAILURE OF PROOF IS NOT REMEDIED BY THE AVERMENT CONTAINED IN COUNT 1 OF INDICTMENT 26,088, THAT AT THE TIME OF THE FORMATION OF THE CONSPIRACY PRICE AND HAAS WERE NOT PERSONS AUTHORIZED TO HAVE THE INFORMATION, SINCE THIS IS NOT EQUIVALENT TO AN AVERMENT THAT IT WAS CONTEMPLATED THAT THE DISCLOSURES SHOULD BE MADE TO THEM IF AND WHILE THEY REMAINED THUS UNAUTHORIZED TO RECEIVE THEM.

The first count of indictment numbered 26,088 contains an averment which does not appear in any other count of either of the indictments, namely, an averment that at the time of the formation of the conspiracy, Mr. Price and Mr. Haas were not members of the department or otherwise authorized to receive the information.

And it would seem to be the contention of the government that in this count at least, there is supplied the averment which is essential to criminality.

The answer to that proposition is found in the

fundamental principles which underlie the crime of conspiracy.

For it is, of course, the law that in conspiracy the offense lies in what is agreed to be done, and that the wrongfulness of a conspiracy is to be determined by the condition which it contemplates shall exist at the time when the act is to be done, and not by those which exist at the time the conspiracy is formed.

An agreement made in anticipation of the death of a relative, who is apparently on his death-bed, to bury him on a given day in the future would not be construed as an agreement to bury him alive, either because he was alive when the agreement was made, or by reason of the fact that when the day arrived he had disappointed expectations and had recovered from the illness, and *e converso*, an agreement to bury a person alive would not be rendered innocent by the fact that before it could be carried into effect, he died a natural death. That which is determinative of the guilt or innocence of the conspiracy is the condition it contemplates.

Or, to adopt the illustration suggested by the learned counsel for the Government (Haas brief, p. 48), an agreement between A, a private citizen, and B, the Sheriff of X County, whereby B was to release C from the County jail on the first of the following month, upon the written order of A, would not constitute a conspiracy to bring about an unlawful jail delivery, unless it contemplated that C's detention would then be authorized or his further detention would then be required by law.

And, manifestly, in the case of either illustration, in

order that the indictment should charge an offense, it would be necessary that it should allege that the conspirators had in contemplation that which constituted the gravamen of the offense and that they agreed, in the one case, to bury on the given day X Y "who *would then and there* be a living person,"—and in the other case, to discharge from custody C, who, on the given day, "*would then and there* be a person lawfully detained by the said B under a warrant of commitment, etc.," or some equivalent allegation.

If these considerations be kept in mind, it will be manifest that the averment here in question tends in no way to supply the element of proof necessary to complete the charge of crime.

The averment, in so far as it is material, is as follows:

> "The said Theodore H. Price and Moses "Haas, who *then and there* (*i. e.*, on the day of "the formation of the conspiracy) were neither "officers nor employees either of the said de- "partment or of the said bureau, and who "*then and there* were persons not in any man- "ner authorized to have or know the informa- "tion last aforesaid" etc. . . . "were *there-* "*after* and in advance of the said official issu- "ance and publication of the said cotton crop "report, to obtain and receive from the said "Edwin S. Holmes, Jr., . . . information "which as aforesaid had and would come and be "known to him, the said Edwin S. Holmes, Jr., "in his said capacity as an officer and employee "of the said department and bureau." . . . (p. 114).

Thus the lack of authorization to receive the information is charged neither as a condition which, in fact, *existed* at the time when the disclosure was to be made, nor as a condition which the agreement contemplated *would exist* at that time, but as a fact existing at the anterior period. And the lack of coincidence in time of the act and the condition which would make it wrongful is not left to possible inference by the omission of a "then and there," as in the case of U. S. *v.* Simmons (*supra*), but is pointed out with scrupulous care by the averment that the act was to be done at a period subsequent to that at which the condition, which would render it wrongful, was charged to exist. The disclosures were not to be made *then*, but "thereafter."

Hence, a complete answer to any claim that this allegation suffices to validate this one count is: that the crime charged is conspiracy; that the criminality is dependent upon the nature of the agreement and upon the conditions upon which the agreement was to act, and not upon conditions existing at the time of its formation.

This principle is established and illustrated by many authorities.

The rule is well stated in United States *v.* Green, 136 Fed., 618, 659, Circuit Court, N. D., New York, in removal proceedings:

> "It is evident to any rational mind that under
> "the decision of the Supreme Court an indict
> "ment purporting to charge a conspiracy to
> "'commit an offense against the United States,'

" which is merely the general name of the crime
" must state *an agreement* to do acts which if
" done would constitute a crime or offense
" against the United States. The acts *to be com-*
" *mitted or done* must be stated, and if the conspir-
" acy be one to commit a crime, where the acts
" done constituting the crime must be done with
" an intent specified in the statute, *then the in-*
" *dictment* for the conspiracy *must allege an*
" *agreement* not only to do the acts, but to do
" those acts with the intent or for the purpose
" embraced within the intent specified in the
" statute creating the offense."

And again, in Sala *v.* U. S., 104 Fed., 544 (C. C. A., 9th Circuit), where the Court says:

" The authorities above cited sustain the
" proposition that *an indictment for a conspiracy*
" to commit an offense against the United States
" *must charge every element of the offense as fully*
" *as though it were for its perpetration.*"

And the rule thus stated is established by the authorities beyond the possibility of question or doubt.

U. S. *v.* Britton, 108 U. S., 199, at 204;
Stokes *v.* U. S., 157 U. S., 187, at 188, 189;
Pettibone *v.* U. S., 148 U. S., 197, 202;
Conrad *v.* U. S., 127 Fed., 789, 800;
Dalton *v.* U. S., 127 Fed., 544, 546;
McKenna *v.* U. S., 127 Fed., 88, 90;
Salla *v.* U. S., 104 Fed., 544, 545;
Johnson *v.* U. S., 158 Fed., 69, 73.

Thus in the Britton case the rule is laid down by this Court that

> " The offense does not consist of the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. . . .
>
> " It follows as a rule of criminal pleading that in an indictment for conspiracy under Sec. 5440, *the conspiracy must be sufficiently charged*, and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy " (U. S. *v.* Britton, 108 U. S., at pp. 204, 205)

And in the Stokes case where the indictment was for *conspiracy* to commit the offense described in Sec. 5480 of the Revised Statutes with respect to fraudulent use of the mails this Court, after describing the elements of the substantive offense, said: " So also " a conspiracy to commit such offense *must state* " *a combination between the defendants to do the three* " *things requisite to constitute the offense*" (p. 189), and held the indictment good only because, upon a review of the averments, it concluded that " the allegation " was *not* what was actually done, but what the defend- " ants conspired and *intended* to do" (p. 190). And the application of this principle is well illustrated by the decision in *Conrad* v. *United States*, 127 Fed., 798, and *Sala* v. *United States*, 104 Fed., 544.

Thus in *Conrad* v. *United States*, 127 Fed., 798, decided by the Circuit Court of Appeals, Fifth Circuit, in 1904, the indictment was for a conspiracy to violate Section 3995 of the Revised Statutes of the United States, which provided that

> " Any person who shall knowingly and wil-

> " fully obstruct or retard the passage of mail or
> " any carriage, horse, driver or carrier carrying
> " the same, shall for every such offense be pun-
> " ished by a fine of not more than one hundred
> " dollars."

The indictment charged that the defendants

> " did knowingly, wilfully and feloniously com-
> " bine, conspire and confederate together and
> " with each other, to commit an offense against
> " the United States, to obstruct and retard the
> " passage of the mails of the United States and
> " the cars and vehicles carrying and engaged in
> " carrying the letter carriers and their pouches
> " containing said mail, to wit, to obstruct and
> " retard the passage of the mail of the United
> " States to and from the main postoffice of the
> " United States in the City of New Orleans, etc."

It did *not* charge that they conspired to obstruct the passage of any vehicle which they *would* know was conveying the mails, or to obstruct the passage of the mails, knowing them to be such. And for this reason the Court held that the indictment could not be construed as charging a crime.

And likewise, in *Salla* v. *United States*, 104 Fed., 544, decided by the Circuit Court of Appeals for the 9th Circuit in 1900, where the indictment alleged that the plaintiffs in error did

> " unlawfully, wickedly and maliciously con-
> " federate and conspire together to commit an
> " offense against the United States: that is to
> " say, to unlawfully, wilfully, maliciously and
> " knowingly . . . obstruct and retard the
> " movements and passage of a certain railway

> " car and train . . . which said railway car
> " and train were then and there carrying and
> " transporting the mails of the United States,"

the Court held it fatally defective because the statute made knowledge *that the mails were being obstructed* an element of the substantive offense, while the averment of the indictment charged merely that the conspirators were knowingly to obstruct a railway car, etc., which in fact was carrying the mails, but did *not* charge that they intended to obstruct *if* they knew that it contained them (pp. 546, 547).

Applying these principles to the allegations here under discussion, it becomes manifest that in order to charge an offense it was necessary to set forth an agreement which contemplated that the information was to be given to Price and Haas at a time when they would be unauthorized to receive it, and that the averment that they were not so authorized when the agreement was made cannot be construed so as to justify an inference that it was *intended* they would not be so authorized when the disclosures were to be made or an inference that the " conspirators " intended that the disclosures should be made to them *if*, at that time, they should be thus unathorized to receive them.

2.

THE ABSENCE OF THIS AVERMENT IS NO LESS FATAL BECAUSE IT IS NEGATIVE IN FORM.

It is conceived possible that it may be claimed by the government that to require an averment that Price

and Haas were to be unauthorized to receive the information is to impose upon the prosecution the burden of pleading a negative, but manifestly such a contention would be without merit, since where a series of acts constitutes an offense only in the event that a certain condition exists, it is settled that the existence of that condition must be pleaded, whether it is in form negative or positive.

> "If a part of the description of the offense "consisted of a negative proposition, it is as "necessary in an indictment for that offense to "state the negative as the affirmative part of that "description."
>
> United States *v.* McCormick, Fed. Cas. No. 15,663, 26 Fed. Cases, 1060, at p. 1063, 1 Cranch, C. C., 593, Chief Judge CRANCH.
>
> And see Ledbetter *v.* U. S., 170 U. S., 606.

3.

THE FAILURE OF PROOF CANNOT BE SUPPLIED BY ALLEGATIONS SETTING FORTH THE PLEADER'S CONCLUSIONS.

It is conceived possible that the government may urge that the allegation that these disclosures were to be made

> "in violation of the said duty of him, the said "Edwin S. Holmes, Jr., as such associate statis "tician honestly and carefully to keep secret, all "statistics and statistical matter and information,

> " knowledge of which was acquired by him as
> " aforesaid as such associate statistician," and
> the further allegation that it was to be done :
> " to prevent, obstruct and impair the due and
> " orderly administration of the business and
> " affairs of the said Department of Agriculture
> " and to the prejudice of the said United States "

will supply the place of averment or proof of the *essential fact* wherefrom it was to be determined whether the disclosures were to be made " in violation of the said duty " or to " prevent," etc., the " orderly " administration of the business of the department; or in other words, that by alleging conclusions from facts which *do not* support them they can import into the proof all the facts which would be required to support those conclusions.

But, of course, mere characterizations cannot supply the place of proof, and an indictment, whether regarded as pleading or as proof, becomes no stronger by a cumulation of adjectives to which the facts alleged do not lend support.

This, too, is well settled

> Cruickshank *v.* U. S., 92 U. S., 542, 558;
> Britton *v.* U. S., 108 U. S., 199, 205;
> Pettibone *v.* U. S., 148 U. S., 197, 203;
> Conrad *v.* U. S., 127 Fed., 798, 800;
> McKenna *v.* U. S., 127 Fed., 88, 91;
> Salla *v.* U. S., 104 Fed., 544, 547.

To quote the language of the Court in Cruickshank *v.* U. S.:

> " The object of the indictment is, first to furnish the accused with such a description of the

charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the Court of the facts alleged, so that it may decide whether they are sufficient in law to support, if one should be had. *For this, facts are to be stated, not conclusions of law alone* . . . (p. 558).

"The accused has therefore the right to have a specification of the charge against him in this respect, in order that he may decide whether he should present his defense by motion to quash, demurrer or plea; *and the Court, that it may determine whether the facts will sustain the indictment.*

"So here, the crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the Constitution. . . . All rights are not so granted or secured. *Whether one is, or not, is a question of law to be decided by the Court, not the prosecutor.* Therefore the indictment should state the particulars, to inform the Court as well as the accused. It must be made to appear—that is to say, appear from the indictment, without going further that the acts charged will, if proved, support a conviction for the offense alleged" (p. 558).

Again in Pettibone *v.* the U. S., the Court, in summing up one of its criticisms of the indictment, said:

"This indictment does not in terms aver that it was the purpose of the conspiracy to violate the injunction referred to, or to impede or obstruct the due administration of justice in the

> Circuit Court; but it states as a legal conclusion from the previous allegations that the defendants conspired so to obstruct and impede" (p. 203).

And manifestly if the pleading of the intent to violate generally the rights and privileges guaranteed by the Constitution is bad, because involving a conclusion, the pleading of an act as in violation of a duty, without stating the facts from which *the Court* can determine whether it was or was not in violation of duty, is equally bad, and for the same reason.

4.

THE VALIDITY OF THE AGREEMENT IS NOT AFFECTED BY THE AVERMENTS THAT IT WAS THE PURPOSE OF THE ALLEGED CONSPIRATORS TO PROFIT BY THE DISCLOSURES THROUGH SPECULATIONS IN COTTON.

Count first of indictment 26,088 contains in connection with the charge of the agreement to disclose the information the following averment of intention:

> "It being the design and intention of the "said Theodore H. Price, Moses Haas and "Edwin S. Holmes, Jr., in so doing to make "use of the said information before the lawful "issuance and publication of the said report for "their pecuniary benefit in speculating in cotton "in view of the probable effect upon the market "price of that commodity which the subsequent "lawful issuance and publication of the said "cotton crop report would have, and in other "ways, to the said grand jurors unknown" (pp. 114, 115).

Clearly this is mere surplusage and can have no effect

upon the validity of the indictment, since there is no law nor any departmental regulation that prohibits any person who obtains information with regard to a cotton crop report from using that information for speculative purposes. Holmes could have so used it, and Price and Haas were equally entitled so to use it if they could acquire it lawfully, and the only question to be determined in testing the validity of the indictment is whether or not the agreement contemplated that the information should be obtained by Price and Haas in any unlawful manner.

C.

Since the rule of the Department of Agriculture, which regulates the disclosure of official information, permitted that information to be disclosed with the permission of the chief of a bureau, and since it is alleged that Holmes, who was to give it out, might exercise the powers of the chief of a bureau, the indictment affirmatively disclosed that the information was not to be given in violation of any rule of the department.

The foregoing considerations are enforced by an inspection of the rules of the department governing the disclosure of information.

The rule of the department upon which these counts of the indictment are framed reads as follows:

> " It is hereby ordered that employees of the
> " Department of Agriculture shall under no cir-
> " cumstances give out in writing or otherwise,

" either for the information of any individual or
" for communication to the public, any statement
" whatever relating to the business of the De-
" partment *without the written approval* of the
" Chief of the Bureau, Division, or Office to
" which they may be assigned for duty, and by
" such approval the chief of any Bureau, Di-
" vision or Office shall assume all responsibility
" to the Secretary for the statement approved
" and for its publication " (p. 101).[1]

And it appears that in 1901 there was promulgated an order to the following effect:

" No information in regard to *transactions* of
" an official character is to be communicated to
" anyone *not connected with the public business*"
(p. 105).

The second of the official orders can, of course, have no application to the case at bar, since it is not charged, and we conceive that it could not be held, that information with regard to the *data on file* in the Department of Agriculture is information with regard to a " transaction " and in any event it must be read in harmony with the first so as to permit the information to be given out with the consent of the chief of the bureau.

The indictment alleges

" that during the time and times aforesaid there
" were in the said bureau other officers and em-
" ployees of the said United States and of the
" said Department of Agriculture, one of whom
" was designated and known as Associate Sta-
" tistician and another of whom was designated
" and known as Assistant Statistician and as As-

[1] This rule was formulated in 1897, misprinted in the record 1907; see stipulation.

" sistant Chief of the Bureau of Statistics, and
" that during the time and times aforesaid,
" whenever the said Statistician was absent from
" the said office, the said bureau was under the
" management of the said *Associate Statistician*
" who acted in the place and stead of said Sta
" tistician as *Chief of said Bureau*" (p. 116).

And the indictment further alleges that *Mr. Holmes was the Associate Statistician* (p. 118).

Hence, it appears by the allegations of the indictment that Mr. Holmes was, or at any time might be, the Chief of the Bureau of Statistics from which the information which was to be disclosed must emanate.

It is apparent, therefore, that under the terms of the regulation which is invoked, the disclosure of information would have been perfectly lawful at any time when Mr. Holmes was acting as Chief of the Bureau and that an agreement whereby he undertook at a time when he was acting as Chief of the Bureau to disclose the information would have been an agreement to do an act entirely within the provisions of the regulation of the department and hence entirely lawful.

The indictment does not allege that the disclosure was to be made at any time when he was not chief of the bureau, the presumptions are that it was *not* so to be made, and on this ground also the indictment is bad.

If any authority were needed in support of this proposition it would be found in the case of *Johnson* v. *United States*, 158 Fed. Rep., 69.

D.

It is not alleged that the conspiracy to render the report "inaccurate" contemplated that its inaccuracy should be any other than that resulting from honest mistake of judgment, or any other than was in the nature of the report inevitable, and hence this branch of the "conspiracy" involved no wrongdoing.

As has been pointed out before, a number of the counts in these indictments are based upon a charge of conspiracy to affect the contents of the report, as well as upon the charge of conspiracy to disclose its contents (Indictment 26,088, counts 3 and 7, pp. 122, 133; Indictment 26,089, count 2, p. 144), and it is essential, therefore, to examine the allegations of those counts.

There is apparent in these counts an attempt upon the part of the pleader to spell out a charge that the appellant and his "co-conspirators" were engaged in an attempt to render a cotton crop report inaccurate, and to procure the Associate Statistician to do some act in violation of his duty in order to bring about that result, and the charge is sufficiently bespattered with the adjectives "untrue" and "inaccurate" to make it appear, upon a superficial reading, as though such a charge were in fact made. But, upon a more careful reading of the counts, it is equally apparent that the pleader found it impossible to twist the facts to support such a conclusion, and that the pleading really charges neither that there was to be any inaccuracy in the report nor that there was to be any breach of duty or

departure from departmental method in its preparation.

A typical count in this respect is the third of indictment No. 26,088. In that count the allegations of the conspiracy, in so far as they relate to this branch, are, in substance, that Holmes

> "in assisting in preparing the said cotton crop report to be issued in the month of June then next following, was to cause and procure the said report to be untrue and inaccurate by causing said report to state that there has been planted in cotton throughout the United States a greater number of acres of land and that the condition of the cotton crop was better than would be shown by such report *if it had been based upon the information as to said cotton crop obtained as aforesaid* and had been truly and accurately prepared" (p. 122).

It is to be observed, therefore, that the charge *is not*,—and in the light of the undisputed evidence that the reports were mere "estimates" in which absolute accuracy was unattainable,[1]—*could* not be that the report was to be rendered untrue and inaccurate in relation to any absolute standard of accuracy, but merely that it was to be rendered "untrue and inaccurate" by stating amounts different from those which would have resulted if it had been based upon the information "obtained as aforesaid."

And obviously, since no report based upon any de-

[1] The indictment itself avers, *not* that the reports were required to be absolutely accurate, but merely that they were required to be as nearly accurate as it was possible for such reports to be.

partmental information could be accurate according to any absolute standard, a charge that it was to be rendered "inaccurate" by stating a different amount from that which would have resulted if it had been based upon some particular information, means no more than that it was to be rendered "different" from what it would have been if it had been based upon that information; a charge which would have been justified if it had been agreed to base the report upon an unofficial census enumeration, and thus to render it absolutely accurate.

The sole question to be determined therefore is whether there was any duty to base the report upon information derived from any particular sources. If not, there was obviously no impropriety in agreeing that other sources should be taken into account, and hence, these counts charge nothing that in the remotest degree savors of a breach of duty.

This question is answered beyond the possibility of question by the indictment, as elucidated by the evidence before the commissioner.

The indictment does not undertake to specify or limit the sources from which information was to be obtained, and avers merely that the reports were obtained from *divers sources* approved by the said bureau (p. 117, 118), and the evidence establishes that the Statistician, under whose management the bureau was placed (p. 116), and who was therefore empowered to determine the sources from which information was to be obtained, had established the practice of receiving information from *any* and ALL sources (p. 81), and of giving the information thus obtained such weight as he saw fit.

And hence there could be no impropriety in refus-

ing to base the report upon information coming from any particular source, and the charge becomes little more than a meaningless absurdity.

Manifestly, in the light of the evidence, no duty devolved upon Holmes or upon the Statistician save that of framing the report in accordance with their best judgment.

Under the practice of the department, as indisputably established, Holmes had a perfect right to consult with Mr. Haas and with Mr. Price in order to ascertain their views and to avail himself of their information in arriving at his final estimate for the report, and they were entirely justified both morally and legally in impressing those views and in endeavoring to persuade him to adopt them. And, if they succeeded and he *was* persuaded, he was not only justified in conveying them to his superior officer, but it was his duty to convey them, and to exert all his powers to induce his superior to act upon that which he honestly believed to be true.

Nor could the propriety of this course be affected by the fact that he or they had financial interests which would be affected by the nature of the report. If Mr. Price and Mr. Haas had bought cotton by reason of their belief that the crop was abnormally small and that cotton was therefore bound to increase in price, they were under no duty, moral or legal, to refrain from an attempt to prevent the department from publishing, as the result of misinformation, an *erroneous* estimate which would redound to their disadvantage. They were no more bound to keep silent because their interests were pecuniary than they would have been if their interests

had been purely patriotic. And Holmes was no more bound to disregard their information because of their interest than he was to disregard that of the official correspondents, many of whom were affected by a like interest (p. 83).

Wrong could arise only if, in making up the report, he were to agree to insert amounts which he believed to be more inaccurate than was inevitable or which did not comport with his best judgment.

And this is not alleged. It is not averred or suggested in any of the counts that Holmes in making up the report was to depart one jot from that which he or Price and Haas believed to be a just estimate, or that in permitting himself to be influenced by considerations other than the departmental data he was to rely upon any information which he did not believe to be true.

Clearly, therefore, there is nothing in these counts even to suggest wrongdoing, and the Court can find in them evidence of probable cause to believe the appellant guilty of crime only by imputing to him and to his alleged associates an intention and purpose which the Grand Jury was unwilling to impute.

The learned Counsel for the Government have suggested that the essential element of wrongdoing may be spelled out of the vituperative allegations in the indictment that in framing the report in the manner in question, Holmes was to be acting "in violation of duty" and "unlawfully and corruptly" (p. 50, Haas Brief), and that the absence of the averment of fact may be supplied by the overplus of characterization. The same proposition as applied to the other counts has

been dealt with at p. 104 of this brief. To justify the transportation of an individual to a distant district, there must be adduced facts, and not the mere conclusions of a prosecuting officer.

E.

The same considerations which demonstrate the innocence of the acts charged as conspiracies to defraud invalidate the indictments charging conspiracies to bribe.

The two counts of the indictment 26,089 attempt to charge conspiracies to commit.

> "The offense of promising, offering and giving to an officer of the United States and a person acting for and on behalf of the United States in an official function under and by virtue of a certain department and office of the government thereof; that is to say, to the said Edwin S. Holmes, Jr., Associate Statistician, a sum of money, the amount of which is to the Grand Jury unknown, to induce him, the said Edwin S. Holmes, Jr., *to do certain acts in violation of his lawful duty*, that is to say:"

And manifestly a conspiracy to bribe an official to do an act in violation of his official duty can suffice to charge that crime only if the acts to be done would constitute such violation of duty.

The acts charged as violation of duty are the same acts as are described under the charge of conspiracy to defraud in the second and subsequent counts of indictment 26,088,[1] and the allegations of those acts are

[1] There is no averment that Price and Haas were at any time unauthorized to receive the information.

substantially if not identically the same as those contained in that indictment.

Hence the same defects that vitiate those counts of indictment 26,088 render indictment 26,089 equally defective. It fails to allege a conspiracy to bribe an official to do an act *in violation of his duty* simply because it fails to aver that he was to perform any act which was not consonant with his duty.

It will of course be no answer to this to observe that to offer to an official a bribe to do an act which is consonant with his duty *may* also be criminal, for that is not the charge which the appellant was called upon to meet, either by the indictment or by the allegations of the removal complaint. (See p. 111.)

By both he was advised that the offense with which he was charged with bribing an official to do an act *in violation of duty*. By both he was advised that the issue to be met before the Commissioner was the existence of probable cause to believe him guilty of *that* crime. Certainly, when he came before the Commissioner he was not called upon to establish that he was not guilty of some other crime of which he was not charged and for which he was not demanded (Benson *v.* Hankel, 198 U. S. 1, at 10). *Non constat* if he had been advised by the removal complaint that he was charged with a crime not set forth in the indictment, he would have undertaken to establish that there was no probable cause to believe him guilty of that other crime. And to hold that he might be removed on the basis of a charge not contained in the removal complaint and not made in the indictment, would be to deny him the opportunity, to which it is established that he is entitled, of proving

that there is no probable cause to believe him guilty of the charge upon which he is demanded. (*Tinsley* v. *Treat, supra.*)

Moreover, the hardship and futility of such a course is especially emphasized by the facts disclosed in the case at the bar.

Manifestly, if he were removed upon this charge, no result could follow save the dismissal of the indictment.

For it is, of course, a rule of criminal pleading that the judgment must be *secundum allegata*, and that an indictment attempting to charge a conspiracy to commit a crime, must set forth all the elements of *the* crime, which is charged as its object, and may not be sustained on the theory that some other crime can be spelled out.

U. S. *v.* Britton, 108 U. S., 199, at p. 207.

F.

It was no part of the function of the Department of Agriculture to keep secret the data which it collected with regard to crops, or to promulgate guesses with regard to the acreage or condition of any of the crops, and hence, Holmes in revealing the data, or in making the guesses, was not performing an official function, and an offer of money to influence him in the performance of these acts would not have been a bribe to influence his decision or action in a matter before him in his official capacity.

Section 5451 of the Revised Statutes provides:

" That every person who promises, offers, or gives,

. . . to any officer of the United States, or to any person acting for or on behalf of the United States in any official function or by authority of any department or office of the Government thereof, . . . with intent to influence his decision or action on any question, matter, or proceeding which may at any time be pending, or which may be law be brought before him in his official capacity, . . . or to induce him to do or omit to do any act in violation of his duty, shall be punished," etc.

It is, of course, unquestioned, that in order to bring an act within the condemnation of this statute, not only must the person to whom a bribe is offered be an officer of the United States or a person performing an official function, but the bribe must be offered to him for the purpose of affecting his decision or action on a question or matter which is before him in *his official capacity*.

U. S. *v.* Gibson, 47 Fed., 833.

It is clear that an officer or employee of a department is not engaged in the performance of an official function unless the matter in which he is engaged lies within the scope of the department to which he is attached, and constitutes an act which that department may lawfully perform.

Hence, if there was no authority which justified the Department of Agriculture in maintaining secrecy with regard to the records, and if the rules and regulations enjoining secrecy in that regard were beyond the power of the Secretary, the preservation of secrecy was not an official act, and an employee who labored either

to preserve or to violate that secrecy was not *pro hac vice* performing an official function, nor doing any act in an official capacity.

And in like manner, if there was no law which permitted the Secretary of Agriculture to promulgate, in the guise of reports, guesses with regard to the condition of the crops, and no law which authorized him to employ any clerks to do his guessing for him, those who were engaged in that highly useless occupation, could not be said to be performing *pro hoc vice* an official function, nor to be doing an act in an official capacity.

And an examination of the Statutes defining the power of the Secretary of Agriculture makes it manifest that neither of these activities were comprised within the official functions of the department.

The general powers of the department itself are prescribed by Section 520 of the Revised Statutes which, so far as material, reads: "There shall be . . . a Department of Agriculture the general *design* and *duties of which* shall be to *acquire* and *to diffuse* among the people of the United States useful *information* on subjects connected with agriculture."

The duty entrusted to the department was, therefore, to acquire and *diffuse* information among the people of the United States, not to acquire and *suppress* such information.

The information when acquired was acquired solely for the purpose of being *diffused* among the people of the United States and any attempt to suppress the data

thus acquired was in violation of the law governing the activities of the department.

Hence, while it is unquestioned that the Secretary of Agriculture might promulgate such rules as were both appropriate to the proper administration of his department, and consistent with the objects for which it was created, he had no power to impose upon any of his subordinates the duty of keeping from the public any data thus collected, and any person who was engaged in keeping such facts secret was engaged, not in performing an official function, but in conforming to an unauthorized and unofficial mandate of the gentleman who held the office of Secretary of Agriculture.

This, we conceive will be the more clearly manifest when it is realized that no useful purpose and no purpose consonant with the objects of the department could be served by such a rule.

The practice adopted of maintaining absolute secrecy with respect to the data collected by the department, not only prior to the issuance of the reports but for all time (p. 140), and of revealing to the public nothing save the periodic official *guess* resulted in the diffusion of these utterly valueless guesses and the suppression of the only matter in the nature of information that the department had collected.

It tended to keep the people of the United States in the dark with respect to the information collected by the department. It deprived the individuals who were interested in the information from exercising their own judgment with regard to the value and significance of the data collected, and remitted them to a dependence

upon the guess of a departmental employee whose conclusions were as apt as not to be misleading, and could certainly not be described as useful information.

It served one purpose and one only, namely, to stimulate a violent and unnecessary burst of speculation on the cotton exchanges at certain periodic intervals.

Nor is the validity of this argument affected by the provision of law requiring that the *reports* issued on the 10th of each month should be submitted to the Secretary of Agriculture before being issued or published (32 Statutes at Large, 300), since that statute deals with the official publication by the department and requires merely that before any reports shall issue *as such*, they shall receive the official approval of the Secretary and there is manifestly nothing in this Statute to warrant a conclusion that any of the *data* collected by the department was not to be made public or that the information which would "*probably*" be contained in the report was to be withheld.

When this is realized, it becomes manifest that in regard to the maintenance or the failure to maintain secrecy with regard to the reports Holmes was not engaged in the performance of an official function, that the payment to him of money to divulge the probable contents of a report or to reveal the data collected by the department would have been a payment in regard to a matter unrelated to his official duties and that hence, however reprehensible it might be, it would not have constituted bribery or any other crime.

The same considerations apply to the other acts for which it is charged that money was to be paid.

It is unquestioned, of course, that the department had power to employ its clerks in the various processes leading up to the collection and promulgation of *information*, and a clerk engaged in collecting and assimilating data or in compiling or in averaging the results of the sectional reports, would have been furthering one of the legitimate functions of the department, and hence, might possibly be held to be performing an official function.

But the authority to compile, compute, or average the crop figures furnished to the department could afford no warrant for the adoption of a system of guessing at what the crop would be or for employing the officials or clerks of the department in making such guesses.

And hence, a clerk who was so employed was not engaged in the performance of any official function.

If the Secretary of Agriculture, instead of adopting the existing method of arriving at the result, had erected in the department, a device in the nature of a roulette wheel and had employed a clerk to spin the wheel and record the result of the spin in the annual report, no one would presume to contend that the clerk who did these acts would not be engaged in the performance of an official function, and this, because it would be too clear for question that he was not doing anything that would by any possibility be productive of information, or could by any possibility come within the scope of the department's power.

Yet the difference between the supposed device and the one actually employed was one of degree rather than one of kind. The guess as to the number of acres planted, or the condition of the crops, was no less a guess because, before it was made the official had collected data of one sort or another, *which he was at liberty to regard or disregard at will*, and the accuracy, or approach to accuracy, of his result would for that reason, be no less a matter of chance.

It is certainly established that an "estimate" of this kind if made in competition for a prize under circumstances where the competitor was required to pay for the privilege of competing would be a gambling transaction and a lottery (People *ex rel.* Ellison *v.* Lavine, 179 N. Y., 164), and to urge that one who was engaged in arriving at results by such methods was attaining information or that the results when arrived at would constitute useful information is to ignore the plain meaning of terms and to justify an absurdity.

Hence, we submit that Holmes, when engaged in making these guesses or in assisting the Statistician in making them, was not engaged in the performance of an official function, and that hence, however reprehensible it might be to pay him to make a guess which comported more nearly with the payer's conception of the ultimate probabilities than that which he otherwise might have made, such a payment would not be made to influence an *official* action and would not constitute bribery or any other crime.

Hence, for this reason also it is clear that no crime is charged by either indictment and therefore that there

were no facts before the Commissioner which permitted a finding that there was probable cause to believe the appellant guilty of any crime.

CONCLUSION.

The order of the Circuit Court should be reversed and the appellant discharged from custody.

De Lancey Nicoll,
John D. Lindsay,
Howard S. Gans,
Thomas Staples Fuller,
of Counsel.

No. 365.

In the Supreme Court of the United States,

October Term, 1900.

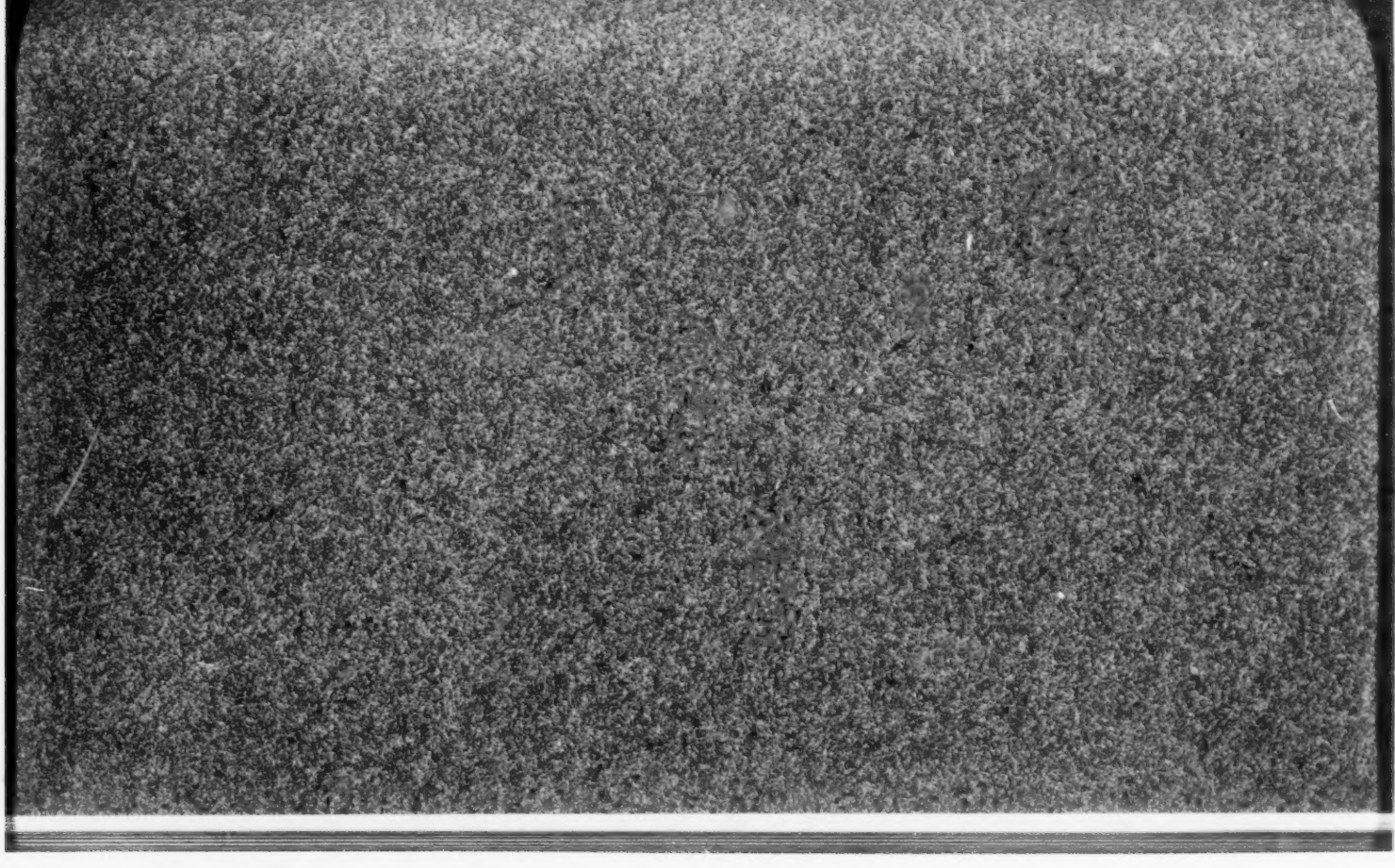
THEODORE H. PEASE, Appellant,

v.

WILLIAM HENRY, United States Marshal for the Southern District of New York, et al.

Appeal from the circuit court of the United States for the southern district of New York.

BRIEF FOR APPELLANT.



In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THEODORE H. PRICE, APPELLANT,
v.
WILLIAM HENKEL, UNITED STATES MARSHAL for the Southern District of New York, et al. } No. 385.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The appellant Price was, on March 1, 1909, committed by United States Commissioner Shields to the custody of the appellee, the marshal for the Southern District of New York, to await the issuance of a warrant for appellant's removal to the District of Columbia for trial upon indictments found against him therein (Rec., 149), the commissioner having found probable cause to believe appellant guilty. (Rec., 194.)

The indictments upon which these removal proceedings are based are two of those involved in the appeal of Moses Haas (No. 367).

The removal proceedings against Price were instituted November 30, 1908, at the conclusion of those against Haas (Rec., 10). The Government

rested after introducing certified copies of the indictments Nos. 26088 and 26089 (Rec., 112, 137) and bench warrants (Rec., 149) and evidence tending to show Price's identity.

In reply appellant introduced certified copies of the two indictments in New York against Price, and the testimony of certain witnesses tending to show that he was not in the District of Columbia on or about May 31, 1905, when certain of the conspiracies are charged to have been formed. He also called two officers of the Bureau of Statistics of the Department of Agriculture, whose testimony he claims disproves some of the material averments of the indictments.

Other evidence offered by him is not stated because he does not here raise the questions made thereby.

There are a number of the technical objections raised and discussed by the appellant Haas, which apparently counsel for appellant Price have deemed not of sufficient importance to merit consideration, inasmuch as they are not mentioned in the brief filed on his behalf; but, in addition to the grounds urged by Haas why he should be discharged, and which are discussed under heads III, subheads A, B, C (pp. 34 to 42), G, I, and J (pp. 45 to 51), and V and VI (pp. 53 to 64) of the Government's brief filed in that case, Price relies upon the following matters to show that the Government failed to prove probable cause of his guilt:

First. That the Government failed to establish his identity;

Second. That he is shown to have been innocent of a conspiracy in the District of Columbia by certain oral evidence introduced by himself before the commissioner, and the recitals in an affidavit made by him in another proceeding, but introduced before the commissioner by the Government; and

Third. That it is shown that the reports were not prepared from the approved information collected by the Bureau of Statistics.

The fact is especially emphasized that if the additional evidence relied on by appellant tends to prove a want of probable cause, yet it involves a weighing of evidence, which will not be done in these collateral proceedings. (*Green* v. *Henkel*, 183 U. S., 249.)

First. Appellant's identity was fully established.

W. S. Mayer, post-office inspector, testified that during the last two years he had been detailed in his official capacity to assist in the investigation of the so-called "cotton-leak" matter; that he had known appellant, Theodore H. Price, since the spring of 1908, and knew him to be the same person mentioned in the Washington indictments upon which the removal was sought (Rec., 21–28).

The Government also placed in evidence the affidavits of the United States attorney for the Southern District of New York, and of Price himself

introduced in opposition to the motion made in the Circuit Court there for consent to the institution of the removal proceedings. In his affidavit (Rec., 152) Price said that he was the same Price who had been twice indicted in the District of Columbia, and who was mentioned in the affidavit of the United States attorney (Rec., 157), to which Price's affidavit was a reply. These two indictments are described as numbers 26088 and 26089, being the same indictments upon which these removal proceedings are based. Moreover, the Directory of the city of New York shows there is but one Theodore H. Price in said city (Rec., 27).

There was not a syllable of evidence offered by Price tending to dispute his identity.

Second. The evidence does not rebut the prima facie case made by the introduction of the indictment that Price was guilty of the conspiracies alleged in the District of Columbia.

The evidence relied upon by appellant to show that he was not guilty of a conspiracy in the District of Columbia is:

1. The indictment found against Price, Haas, and Holmes in the Southern District of New York;

2. The evidence of Charles L. Matthews that he was a room clerk at the Waldorf-Astoria Hotel, New York City, and that late in the afternoon of May 31, 1905, Price registered at that hotel (Rec., 52, 53); the evidence of Charles B. Ward that he was superintendent and coachman for Price, that he saw Price about 9 o'clock a. m.

on May 30, 1905, in Princeton, N. J., and about quarter to 3 p. m. at his stable on the same day, and about 10 minutes past 7 p. m. passing his stable with a pair of horses, and that about 10 minutes of 8 o'clock on the next morning, May 31, he took Price to the station (Rec., 54); and the evidence of Russell Coates that Price was at his place of business in New York City at various times during the day of May 31, 1905 (Rec., 56); and

3. That portion of Price's affidavit filed by him in the previous removal case and presented by the Government on the hearing before the commissioner in these proceedings to prove his identity, which reads as follows:

> I am a cotton merchant, and have been engaged in that business in the city of New York for upward of twenty-five years, and during all of that time I have resided and still reside in the city of New York in the Southern District of New York, and I never resided or was engaged in business in the District of Columbia. During the period covered by the charges contained in said indictments, namely, between the 1st day of November, 1901 (and indeed for considerable period [illegible] thereto), and the 1st day of August, 1905, I was not in the District of Columbia on any occasion unless possibly while on a train passing through said District to some point farther south, and to the best of my recollection I was not in the District of Columbia at all during the said

> period. There was certainly no occasion during said period on which I was within the District of Columbia and there had any communication directly or indirectly with the defendants Haas and Holmes, or either of them (Rec., 153).

The inadmissibility, or if admissible, the weight to be attached to the New York indictments, is fully considered in the brief filed by the Government in *Haas* v. *United States*, point VI, (pp. 57 to 63); and we will here consider only the other two items of evidence.

1. The verbal testimony is entitled to no weight in determining whether or not Price entered into the conspiracy alleged in the indictment, (1) because he could have entered into the conspiracy in Washington and yet have remained in the city of New York, by either telegraph, by telephone, or by letter, *United States* v. *Thayer*, 209 U. S., 39; *Armour Company* v. *United States*, 209 U. S., 56, 74, 77; and there is no intimation in the record that he was not, on the 31st of May, 1905, in communication with his co-defendants in the city of Washington. (2) The allegations of the indictments may be sustained as well by proof of a conspiracy entered into upon any other date which is not barred by the statutes of limitations, as upon the 31st day of May, 1905. *Ledbetter* v. *United States*, 170 U. S., 606, 612.

2. The quotation from Price's affidavit, instead of refuting the allegations in the indict-

ments that he entered into the conspiracies described in the indictments in the District of Columbia, in fact shows to the contrary. It will be noted that Price carefully abstains from denying anywhere in this affidavit that he is not guilty of the offenses alleged in the indictments, but contents himself with the statement, in the last sentence of the quoted paragraph, that "There was certainly no occasion during said period on which *I was within the District of Columbia and there* had any communication, directly or indirectly, with the defendants Haas and Holmes or either of them. That is, he denies that he, *while himself* in the District of Columbia, had communication with Haas and Holmes, or either of them, but he does not intimate a denial that while Haas, and Holmes or either of them, were in the District of Columbia, he, *when elsewhere*, did not communicate and form a conspiracy with them.

This manifestly studied effort upon the part of Price to avoid any denial of entering into an actual conspiracy with Haas and Holmes, of the character mentioned in the indictments, and a mere denial that he made no such conspiracy *while he himself was in the District of Columbia*, should be, under the rules of weighing evidence, considered as an admission upon his part that he, *while elsewhere*, did enter into such conspiracy.

Furthermore, his denial only covers the period from the first day of November, 1904, to the first day of August, 1905, when, as heretofore stated,

conviction could be had on proof of conspiracy entered into at any other time within the period prescribed by the statute of limitations.

3. In the second and fifth counts of indictment No. 26088 it is alleged that defendants conspired on the 15th day of November, 1904, and at all times between that date and the 5th day of July, 1905, and of course evidence of Price's whereabouts on the 31st day of May, 1905, does not refute this allegation.

Third. The reports were prepared from approved information collected by the Bureau of Statistics.

On this subject the indictments charge that in acquiring information pertaining to cotton, the bureau made use of divers agencies, among others, correspondence with cotton planters, dealers, and ginners, through employees and agents in the cotton States, and through special investigations in the field; and that it was the duty of the employees of the bureau to prepare a true and accurate report from the information of the said crops obtained as aforesaid, without regard to the influence which said reports might have upon the market price of cotton. (Counts 1 and 2, No. 26088; Rec., 113, 118.)

Appellant called as a witness Victor H. Olmsted, who testified that he was now Chief of the Bureau of Statistics, and that he had been employed in that bureau off and on since 1901. (Rec., 72, 73.) The witness also explained the crop-report system in detail, and it appears there-

from that the cotton reports are issued on the 3d day of the month for six months in the year, beginning in June and ending in December, omitting November; that the June report shows the acreage of cotton planted and to be planted throughout the season (Rec., 93), as well as the condition of the growing crop on May 25; and that the next four reports show only the condition of the growing crop, while the last report, issued in December after the crop has been harvested, shows the total yield (Rec., 73–78, 87, 88).

During the entire season the bureau has four reporters, known as the township correspondents, the county correspondents, the state statistical agents, and the traveling field agent. For the June and December reports there are several additional sources of information.

In each township there are one or more reporters who at the appointed time send in to the bureau reports on the condition of the crop. These reports for the entire State are mathematically averaged by the clerks in the bureau, each township being given its relative weight according to the amount of cotton grown therein. The reports of the county correspondents are averaged in the same way, and when finally the result for each of the cotton-producing States, as shown by the county and township correspondents, is ascertained, the figures for the several cotton-producing States are handed to the statistician or to the associate statistician. The reports in June and De-

cember from the additional and special correspondents are handled in the same way (Rec., 77, 78, 87, 88).

In each cotton-producing State is a statistical agent who has reporting to him a number of correspondents. At the appointed time he sends direct to the statistician, or to the associate statistician, his report showing the condition of the crop, and in June the acreage planted, and in December the yield. The traveling field agent either sends or brings in a similar report covering the entire cotton area. (Rec., 81, 88, 89.)

When these reports are all in on crop-reporting day, the statistician, the associate, and several other employees of the bureau are confined under lock in the rooms where they prepare the final report from all of this information (Rec., 84, 95); this report is then submitted to the Secretary of Agriculture, and after he approves it is formally published to the world at large.

It is urged by appellant that the report of the statistician, when finally made, was simply an estimate and that it was not based upon the information which was collected at this enormous expense by the Department of Agriculture.

The reports of the various correspondents were many of them estimates, and the final crop report itself was in one sense an estimate, and in making up this report relative values were attached to the figures of the different classes of correspondents. (Rec., 81, 82.) Nevertheless, the crop report,

hen finally made, was based upon the informa-ion which had been gathered, and was intended o be a true and accurate report thereon. This act is proven by the testimony of the witness)lmsted.

On page 82 he says:

> The practice was not to average them but to consider them only in relation to the other and the relative value to be attached to the different classes of reports, and to fix a figure, as I remember, *within the limits of the figures before him, which in his opinion represented what ought to be the correct figure for each State*.

At page 91 he says:

> Those reports were the basis of the final estimate of the bureau, and other information, if credible and reliable, may have been used in connection with those reports, *but those reports themselves formed the basis of the estimate of the statistician* * * *. *It was the intention and the effort, I am convinced, to make as accurate and as true a report, based upon those sources of information I have described, as it was possible to make.*

It is therefore insisted that the judgment of the court below should be affirmed.

J. A. Fowler,
Assistant Attorney-General.
Jesse C. Adkins,
Special Assistant to the Attorney-General.

O

No. 885.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THEODORE H. PRICE, APPELLANT,

v.

WILLIAM HENKEL, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, ET AL., APPELLEES.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLEES.

In the Supreme Court of the United States

OCTOBER TERM, 1909.

THEODORE H. PRICE, APPELLANT,
v.
WILLIAM HENKEL, UNITED STATES MARSHAL for the Southern District of New York, et al., appellees. | No. 385.

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLEES.

I.

The order of removal should be sustained, notwithstanding the fact that Price has been indicted and bailed for trial in the Southern District of New York.

The first proposition relied upon by appellant is thus stated on page 21 of his brief:

> When an accused has been imprisoned or bailed for trial before a court of competent jurisdiction in the district where he lives, and where he was present when the alleged offense was committed, section 1014 does not authorize his subsequent removal from that district for trial in another, even though a court in the latter district may also have jurisdiction to try him.

In reply to this proposition we say:

First. *The Constitution does not give an accused the right of trial "in the district where he lives, and where he was present when the alleged offense was committed."*

The accused's place of residence, and his location when the alleged offense is committed, has nothing to do with the forum before which the trial is to be had.

In *In re Palliser* (136 U. S., 265), this court said:

> But the right thereby secured is not a right to be tried in the district where the accused resides, or even in the district in which he is personally at the time of committing the crime, but in the district "where the crime shall have been committed."

Likewise, in *Armour Packing Co.* v. *United States* (209 U. S., 76), the court said:

> But the constitutional provision does not require the prosecution of the defendant in the district wherein he may reside at the time of the commission of the offense, or where he may happen to be at that time, provided he is prosecuted where the offense is committed. The constitutional requirement is as to the locality of the offense and not the personal presence of the offender.

See also *Burton* v. *United States* (202 U. S., 387).

It had as well be insisted that the person against whom an offense is committed is entitled to have the case tried in the district of his residence, since he is as likely as the accused to reside in such district.

Some courts have indulged in the sentiment that an accused is entitled to a trial among his neighbors, but however such a sentiment may have prevailed a few centuries ago in England, it has no place in the modern administration of justice in this country. The purpose now is to secure jurors who have neither formed nor expressed any opinion as to the guilt or innocence of the accused, and who are entirely without feeling or sentiment in the matter.

Second. *The statutes clearly contemplate that where one is indictable for an offense in either of two or more districts he may be removed from one of such districts to another for trial.*

So much of section 1014, Revised Statutes, known as the removal statute, as is here material, reads as follows:

> For any crime or offense against the United States the offender may, by any justice * * * be arrested and imprisoned * * * *for trial before such court of the United States as by law has cognizance of the offense.* * * * And where any offender * * * is committed in any district *other than that where the offense is to be tried*, it shall be the duty of the judge of the district where such offender * * * is imprisoned seasonably to issue * * * a warrant for his *removal to the district where the trial is to be had.*

Section 731, Revised Statutes, reads as follows:

> When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been

> committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, *in the same manner as if it had been actually and wholly committed therein.*

It was insisted in argument that this section has no bearing upon this case. But why not? If the conspiracy had been formed by correspondence, or telephone, or telegraph, while Holmes was in Washington and Price and Haas in the Southern District of New York, it would necessarily have been begun in one district, and would probably have been completed in the other. If it had been made tentatively in one district and confirmed in the other, or if Price and Haas conferred in New York and Haas then came to Washington and there completed the conspiracy with Holmes, which very likely is the manner in which the conspiracy was formed, the statute would certainly be applicable.

But there is the best of reasons why this statute was intended to apply especially to conspiracies of this character, and, in fact, to cases precisely like this one. Section 5440, Revised Statutes, under which these indictments are drawn, and section 731, were not only originally enacted in the same statute, but were in the same section, the two constituting section 30 of the act of March 2, 1867 (14 Stat., 484).

As has been repeatedly observed by this court, two things are necessary to create an offense under section 5440—one the formation of the conspiracy and the other the commission of an overt act; and it is apparent that in the enactment of that part of the

section which now constitutes section 731, Revised Statutes, Congress had reference to the district in which the conspiracy is formed, and the district in which an overt act or acts are committed in pursuance thereof.

In any event, this section is but the declaration of the law which is applicable to a case cognizable in two or more districts. Neither in section 1014 nor in section 731 is there any intimation that when the Government elects to prosecute an accused before the court of one district, having jurisdiction, he has any right to resist removal thereto upon the ground that he resides in a district in which he *may also* be indicted. The latter part of section 1014 speaks of the removal of an offender "committed in any district other than that where the offense *is to be tried*," not where the offense is "*triable*," which would have been the word used had it been intended not to provide for his removal from such a district; and it further provides for his removal to "the district *where the trial is to be had*," which is certainly the district in which the indictment is found and the prosecution is being pressed.

Since the Government had these indictments found in the District of Columbia, it is but fair to presume that it intended trials to be there had upon them, and that presumption became a certainty when it had the defendants taken into custody and proceedings instituted for their removal; and this certainty was further confirmed when, at the instance of its highest legal representative, it had all proceed-

ings under the New York indictments stayed until the prosecutions in the District of Columbia could be disposed of. Then the District of Columbia is "*the District where the trial is to be had*," and to which, under the statute, the Government has a right to have the accused removed.

But it would appear that the language in section 731 that the offense mentioned "may be *dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein*," could leave no doubt upon this question. This clearly means that not only may the offense be tried in either district, but that it may be "dealt with;" that is, that every preliminary step may be taken to secure a trial precisely the same as if the offense had been *wholly* committed in such district. When the law provides that a trial may be had in a certain district, it necessarily implies that a removal of the accused may be had to such district; otherwise how could the trial be had there? But this phase of the question was settled by this court in *In re Palliser* (136 U. S., 265). Palliser was accused of attempting to bribe a postmaster to sell stamps otherwise than for cash, the offer having been made by letter written in New York City and sent to the postmaster at Black Hall, Conn. It was insisted on behalf of Palliser that he should have been indicted in New York. The court held that the defendant was indictable in the district court of Connecticut, and deemed it unnecessary to determine whether he

might be also indicted in the Southern District of New York, using the following language:

> In the case before us, the offense charged being an offer of money, or a tender of a contract for the payment of money, contained in a letter mailed at New York and addressed to the postmaster in Connecticut, to induce him to violate his official duty, it might admit of doubt whether any offense against the laws of the United States was committed until the offer or tender was known to the postmaster and might have influenced his mind. But there can be no doubt at all that if any offense was committed in New York, the offense continued to be committed when the letter reached the postmaster in Connecticut; and that, if no offense was committed in New York, an offense was committed in Connecticut; and that in either aspect the district court of the United States for the District of Connecticut had jurisdiction of the charge against the petitioner. Whether he might have been indicted in New York is a question not presented by this appeal.

Since the court considered the determination of the question whether the defendant might have been indicted in New York immaterial, the result of the holding necessarily was that the accused could be *removed to the district court of Connecticut for trial, although he might have been subject to indictment in New York.*

Third. *The fact that indictments have been found against the accused in the Southern District of New*

York, for some of the same conspiracies, and he put under bail to answer such indictments, did not change his status and give him, at his option, a right of trial in that district.

In vain will the statutes be searched for a single intimation, that an accused who resides in one district, in which he may be indicted, is vested with any additional right as to the *situs* of the trial by the fact that an indictment has been returned against him and he put under bail in that district. There is, we confidently assert, no principle of law which authorized the commissioner to take such a fact into consideration on a hearing for removal. In acting upon cases of removal, as has been repeatedly held, the commissioner is acting in a judicial capacity. He must hear and determine the question upon the evidence as applied to fixed principles of law, and his judgment is not a matter of discretion. But let it be conceded that the commissioner has a right to consider whether a removal under the circumstances would be oppressive, and exercise his discretion in the matter, this court can not, in these collateral proceedings, overrule that discretion when once exercised. The fact that the Government must take the initiative in prosecutions necessarily gives to it the choice of forums when it may proceed in either of two or more districts. Suppose the Government had indicted the accused in the Southern District of New York alone, and he had been there arrested and put under bail; could he have forced the Government to try him in that dis-

trict? He would certainly have had a right to require some disposition to be made of the case without unreasonable delay, but the Government could have elected whether it would try or dismiss. Now, the Government saw proper for some reason, which should be deemed a good and proper one, to return indictments against the accused in both the Southern District of New York and the District of Columbia at the same time. It certainly has no right to have him *tried* upon both sets of indictments in so far as they charge the same offense; but it is equally clear that he can not choose upon which indictments he shall be tried. The choice still remains with the Government, and that choice can not be taken away until he has been placed in jeopardy under one or the other of them.

As above stated, however, here the Government has clearly indicated "where the trial is to be had," by asking and obtaining a stay of the proceedings under the New York indictments and by demanding that the accused be removed for trial to the District of Columbia. It may be doubtful whether the stay of proceedings in New York should have been granted over his protest, if such protest was entered. He had a right to a disposition of that case within a reasonable time, but not a right to permit it to remain there and interpose it as a defense to the removal proceedings.

Notwithstanding the suggestions in counsel's brief to the contrary, we insist that the action of the Government in this matter was entirely proper and not

in the least oppressive or tyrannical. In 1905 it had indicted Haas, Peckham, and Holmes for offenses similar to some of the alleged offenses set out in the indictments under which Haas and Peckham are now sought to be removed, but relating entirely to the crop reports issued in 1904. Removal proceedings were instituted thereunder, but failed. It was manifest that the District of Columbia was the actual *situs* of these offenses, the conspiracies in a large measure having there been entered into and many of the overt acts there committed. We say in a large measure, because such evidence as is in the records of this and the Haas cases shows that some of the parties would talk the matters over in New York and then a representative would come to Washington and there confer with Holmes. It was felt, however, that there was some uncertainty as to whether removal proceedings would be successful; and it was certain that the offenses would be barred by the statute of limitations before a final determination of such proceedings could be had. Under these conditions the Government deemed it advisable to have indictments returned in both jurisdictions, and if possible have the defendants all removed to the District of Columbia and there tried; but if it should fail in the effort to procure their removal, then to try the New York defendants there, although its case would be much weaker. If the Government fails to procure their removal, its cases are in this peculiar condition: Holmes can not be removed to New York and tried there, because he is indicted in the District of Columbia; consequently

it would necessitate two long and expensive trials, although the defendants are co-conspirators and are joined in the same indictments and should be tried together.

It is easy to imagine an extreme case where the action of the Government under the principles here insisted upon would be oppressive, but no one ever heard of the Government seeking to apply them in any such case, and there is not the least probability that it would ever do so. If it were animated by an evil spirit, many of its criminal laws could be used as instruments of tyranny and oppression. On the other hand, there would be a far greater probability of a holding with appellant's contention resulting in many instances in a denial of justice.

Cases just as extreme may be imagined on behalf of the Government. For instance, suppose a number of persons, one of whom resides in each judicial district of the United States, were to enter into an unlawful conspiracy by mail or telegraph; and suppose, as a matter of precaution, the Government should procure indictments against them in all the districts. Can it be insisted with reason that it could be compelled to proceed with a separate trial in each district, and there is no method by which it could procure a trial at one place of all or a part of them together?

To the suggestion that oppression and tyranny might result from the adoption of the rule contended for by the Government, the following language used

by this court in *United States* v. *Keitel* (211 U. S., 394, 395) is pertinent:

> Nor do we deem it necessary to do more than briefly refer to the elaborate statements at bar concerning constructive crimes and the fear which also found expression in the opinion below, that if the words "to defraud in any manner or for any purpose" receive a broad significance, charges of crime may be hereafter predicated upon acts not prohibited and innocuous in and of themselves, and which, when they were committed, might have been deemed by no one to afford the basis of a criminal prosecution. *It will be time enough to consider such forebodings when a case arises indicating that the dread is real and not imaginary.* That they are mere phantoms when applied to the case here presented results from the obvious consideration that the conspiracy charged had for its purpose the doing of acts which were in clear violation of the direct prohibition of the coal-land laws, a prohibition whose meaning and effect had been unmistakably announced and applied by a decision of this court rendered many years before the formation of the conspiracy here charged.

Fourth. *The fifth and seventh counts of indictment No. 26088 charge offenses which are not charged in the New York indictments.*

In the fifth count the conspiracy to defraud was that Holmes would furnish to Haas and Price the information to be obtained in each crop report, and whenever such information should be furnished

Price, he, before the publication of the report, would engage in buying or selling cotton, as the case might be, and after the report had been finally published Price would sell or buy the cotton theretofore handled, and the profits thus realized would be divided among the conspirators; and among the overt acts committed pursuant to this conspiracy, and not charged in the New York indictments, it is alleged that Price, after receiving the information from Holmes, through Haas, did speculate, realizing the sum of $750,000, of which he gave Haas the sum of $125,000. (Rec., p. 127, 128, 129.)

In the seventh count the conspiracy charged was that Holmes was to cause the report to be prepared to show the number of acres planted in cotton only up to the 25th of May preceding, and as soon as the report should be published Price was to telegraph to the bureau inquiring if the report included alone the number of acres planted up to May 25, and Holmes was to cause a reply to be sent that the report included only the acreage planted to May 25; and the overt acts there charged, which are nowhere else mentioned in any of the indictments, were that on May 23, 1908, in New York, Price promised Holmes a large sum of money, the amount being unknown, which sum Price gave to Holmes on May 25, 1908. (Rec., pp. 133, 134.)

The conspiracies charged in these counts are entirely distinct from any conspiracy charged in either of the New York indictments, and, as stated, certain of the overt acts charged to have been com-

mitted in connection therewith were not mentioned in those indictments; and Price could not, therefore, be tried for these offenses in New York.

Fifth. *The other conspiracies charged in the New York indictments may have been entirely different from those charged in the indictments found in the District of Columbia.*

The only evidence of identity is the fact that they are charged in the same language in both sets of indictments, with the exception that in one set the conspiracies are charged to have been formed in New York, while in the other indictments they are alleged to have been formed in the District of Columbia. But this difference might very well be regarded as vital, and sufficient to show that the two sets of conspiracies were entirely different.

II.

This is a collateral attack on the proceedings before the commissioner, and the only thing now to be determined is whether or not the commissioner had jurisdiction to order a removal.

In *Greene* v. *Henkel* (183 U. S., 261), it was said:

> Upon this writ the point to be decided is *whether the judge who made the order for the removal of the defendants had jurisdiction to make it, and if he had, the question whether upon the merits he ought to have made it is not one which can be reviewed by means of the writ of habeas corpus.*

Jurisdiction upon that writ in such a proceeding as this does not extend to an examination of the evidence upon the merits. The matter for adjudication is similar to that which obtains in cases of international extradition. In such case, if there is competent legal evidence on which the commissioner might base his decision, it is enough, and the decision can not be reviewed in this way. (*Bryant* v. *United States*, 167 U. S., 104.)

III.

The jurisdiction of the commissioner depends, first, upon whether the statutes create either of the offenses charged or attempted to be charged in the indictments; and, second, whether there was any material evidence introduced which tended to show that such offense had been committed, and if so, that Price was criminally connected therewith.

There are two classes of counts. One class charges conspiracies to defraud the Government, the frauds to be perpetrated by procuring Holmes to impart information about the cotton-crop report, which, under the rules and regulations of the Department of Agriculture he ought to have kept secret, and by procuring Holmes to make false and inaccurate reports. The other class charges conspiracies to bribe Holmes to impart information which he was required to keep secret, and to make false and inaccurate reports.

First. The statutes create the offenses charged.

(1) *Under the statutes it was a governmental function to gather information with reference to cotton crops and to disseminate same.*

Section 520 of the Revised Statutes provides that the general designs and duties of the Department of Agriculture shall be to "*acquire and to diffuse among the people of the United States useful information on subjects connected with agriculture.*"

Omitting other acts, which are mentioned on pages 12 to 14 of the government's brief filed in the Haas case, the appropriation act of 1892 provided as follows:

> *Collecting agricultural statistics, Division of Statistics.*
>
> Collecting domestic and foreign agricultural statistics, expenses of local investigations and compilations, and necessary traveling expenses; statistical publications furnishing data for permanent comparative records; *compiling, writing, and illustrating statistical matter for monthly, annual, and special reports*, and the necessary expenses of the same, including papers and envelopes, postal cards, and postage stamps, one hundred thousand dollars: *And provided further*, That the monthly crop report issued on the tenth day of each month shall embrace only a statement of the condition of the crop by States and in the United States, with such explanations and comparisons with other months and years as may be useful for illustrating the above matter, *and that it shall be submitted to the Secretary of Agriculture, who shall officially approve the report before it is issued or published.*

The appropriation act of 1904 changed the dates of the reports to the 3d and 10th, and the cotton crop report was thereafter issued on the 3d.

Section 161, Revised Statutes, reads as follows:

> The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property pertaining to it.

Thus the Department of Agriculture was expressly authorized to do the very things which it is alleged in these indictments it was doing, and to adopt rules to govern the conduct of employees while performing those services—rules to govern not only the gathering of the information, *but also the diffusing of it*. And the fact that the reports were first to be submitted to the Secretary and approved by him, before publication, and were to be published on specific days, certainly authorized a rule that the information should be withheld until such approval and the days specified.

But the court will not consider whether the department had the power to adopt rules. In *Benson* v. *Henkel* (198 U. S., 1, 9, 13) the grounds of objection to the indictment were thus stated by the court:

> (1) Objection is made to the indictment upon the ground that at the time of payments to these officers the special agents' reports had not come into their possession or knowledge, and there is no allegation to prove that it ever

would; that they had no duty concerning it; that it was not shown that they ever would have such duty; and that a charge of bribery can not be based upon payment to an officer to induce him to perform an act as to which he has no duty, and may never have any duty. (2) *That neither of these officers was forbidden by any lawful duty to reveal to Benson the contents of any report, even if they should ever come into a position to do so. Upon these grounds it is insisted that the indictment charges no offense against the United States under section 5451.*

In commenting upon the duty of the commissioner to inquire into these matters, the court said:

> The commissioner was not required to determine for himself whether the statute applied to reports which had not yet been filed, and which might never be filed, or whether the words of the statute "which may at any time be pending, or which may by law be brought before him in his official capacity," apply to the pendency of an obligation not to reveal the contents of a paper then in his possession. This was peculiarly a subject for examination by the court in which the indictment was found.
>
> Like comment may be made with reference to the second objection, that neither of these clerks was forbidden by any lawful authority to reveal the contents of such reports, upon the ground that there was no statute imposing such obligation. *But it is clearly for the court to say whether every duty to be performed by an official must be designated by statute, or*

> *whether it may not be within the power of a head of department to prescribe regulations for the conduct of the business of his office and the custody of its papers, a breach of which may be treated as an act in violation of the lawful duty of an official or clerk.* (*United States* v. *Maccdaniel*, 7 Pet., 1, 14.)

(2) *To corruptly impart information contrary to the rules of the department, and to willfully and corruptly make false and inaccurate reports were frauds upon the Government.*

This question is discussed at length on pages 16–30 of the Government's brief filed in the Haas case, to which reference is made.

(3) *To bribe Holmes to impart information against the regulations of the department or to make false reports was an offense under section 5451, and to conspire to bribe him to do so was an offense under section 5440.*

Section 5451 provides:

> Every person who promises, offers, or gives, or causes or procures to be promised, offered, or given, any money or other thing of value, or makes or tenders any contract, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, to *any officer of the United States or to any person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the Government thereof, * * * with intent to influence his decision or action on any question, matter, cause, or proceeding*

> *which may at any time be pending*, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any action in violation of his lawful duty, shall be punished as prescribed in the preceding section.

That Holmes was an officer within the meaning of this statute, or was at least "a person acting for or on behalf of the United States in an official function," is considered in the Haas brief, pages 34–38.

Second. There was material evidence before the commissioner to show that Price is guilty of the offense charged.

We entirely disregard all questions made as to the sufficiency of the indictments as a pleading, because such questions can not be considered in these proceedings. The indictment is not here introduced as a pleading, but *solely as evidence of probable cause*.

Upon this question, in *Benson* v. *Henkel* (198 U. S., 12), the court said:

> *It must be borne in mind that the indictment is merely offered as proof of the charge originally contained in the complaint, and not as a complaint in itself or foundation of the charge, which may be supported by oral testimony as well as by the indictment.* When the accused is arraigned in the trial court he may take advantage of every insufficiency in the indictment, since it is there the very foundation of the charge, but to hold it to be the duty of the commissioner to deter-

> mine the validity of every indictment as a pleading, *when offered only as evidence*, is to put in his hands a dangerous power, which might be subject to serious abuse.

With reference to the amount of evidence necessary to sustain, in a *habeas corpus* proceeding, the order of removal, the rule is substantially the same as with reference to the finding of facts by a jury; that is, that the evidence will not be weighed by the court, but the order will be sustained if there is *any* evidence upon which it can rest. Thus, in *Hyde* v. *Shine* (199 U. S., 84) this court said:

> In the federal courts, however, it is well settled that upon *habeas corpus* the court will not weigh the evidence, although if there is an entire lack of evidence to support the accusation the court may order his discharge. In this case, however, the production of the indictment made at least a *prima facie* case against the accused, and if the commissioner received evidence on his own behalf, it was for him to say whether upon the whole testimony there was proof of probable cause.

Then we must take the allegations of each and every count in the indictment, together with the other evidence, and determine whether or not *there anywhere appears therein any material evidence to sustain the commissioner's finding of probable cause.*

The following are the special matters as to which it is insisted that the evidence is insufficient:

(*a*) *That there is no evidence that it was contemplated when the conspiracy was formed that Price and Haas*

would be persons unauthorized to receive the information when it was to be imparted to them by Holmes. (Appellant's brief, p. 8.)

This applies only to counts alleging fraud by divulging information.

The following allegation appears in the first count of indictment No. 26088:

> The said Theodore H. Price and Moses Haas, who then and there were neither officers nor employees either of the said department or of the said bureau, and who then and there were persons not in any manner authorized to have or know the information last aforesaid, or be informed as to the probable contents or character of the said crop report in advance of its official issuance and publication, or without such report being first submitted to and officially approved by the said Secretary, and who well knew all the premises in this indictment above set forth, were thereafter, and in advance of the said cotton-crop report, to obtain and receive from the said Edwin S. Holmes, junior, and the said Edwin S. Holmes, junior, also then well knowing the said premises, was to give and divulge to them, the said Theodore H. Price and Moses Haas, information which as aforesaid had and would come and be known to him, the said Edwin S. Holmes, junior, in his said capacity as an officer and employee of the said department and bureau, and this without the said cotton-crop report being first submitted to and officially approved by the said Secretary of Agriculture. (Rec., p. 114.)

The following overt acts are charged in the first count of indictment No. 26088:

On May 31 Price and Haas met in New York City to confer concerning the conspiracy.

On June 1 Haas went from New York to Washington.

On June 1 Holmes imparted information to Haas in Washington.

On June 2 Holmes imparted information to Haas in Washington.

On June 2 Price received the information in New York. (Rec., pp. 115, 116.)

It thus appears that on the very day of the conspiracy, when it is expressly alleged that Haas and Price were not such persons as could be lawfully given the information, the offense was completed by the commission of an overt act, and that on both the first and second days following the information was actually imparted. The allegations of the indictment further show that the information was to be divulged *unlawfully and as the result of a corrupt scheme;* and the commissioner was therefore well warranted in finding that it was contemplated that this information should be given when Haas and Price were not entitled to receive it.

(*b*) *That it is shown that Holmes, as associate statistician, might have had the right to impart the information.* (Appellant's brief, p. 108.)

This likewise applies only to counts for fraud to be perpetrated by imparting information.

This contention is based on the allegations which appear in several places in the indictments, that Holmes was associate statistician, and as such he, in the absence of the statistician, was the head of the Bureau of Statistics; and the order of the Secretary, dated March 20, 1897 (Rec., p. 103), that no employees should give out any information "without the written approval of the chief of the bureau, division, or office to which they may be assigned for duty, and by such approval the chief of any bureau, division, or office shall assume all responsibility to the Secretary for the statement approved and its publication." It is insisted that since he might be chief of the bureau, then he might have had under this order the right to impart the information when given. But what is the evidence to the contrary? In the first count of indictment No. 26089 (Rec., pp. 140, 141) it is alleged:

> That during the time and times aforesaid a custom and practice prevailed in the said Department of Agriculture, established and sanctioned by the said Secretary, under which the giving out to the public of any information collected by the said Bureau of Statistics or its officers or its said employees, to be used in the preparation of or contained in any of said crop reports, was prohibited, and the keeping of such information secret was required, except such information as was contained in said crop reports when and after the same had been officially issued and published.
>
> And that during the time and times aforesaid the said statistician and associate sta-

tician and the other officers and employees aforesaid of the said Bureau of Statistics were charged with the duty of honestly and carefully guarding and keeping secret and of not divulging to any person not employed in or connected with said Bureau of Statistics any information acquired by him or them in the course of preparing and assisting in preparing the said crop reports and in collecting statistics and compiling statistical matter for use in the preparation of said crop reports, or any of the matters and things and other information which might be contained in any of said crop reports, until said crop reports had been prepared, officially approved, and issued and published as aforesaid, and thereafter said duty of maintaining secrecy as aforesaid continued save and except as to the matters and things so officially made public in said reports.

And that it was Holmes's duty—

Honestly and carefully to guard and keep secret and not to divulge to any person not employed in or connected with said Bureau of Statistics any of said statistics and statistical matter or information from which said crop reports, including said cotton crop reports, were to be prepared, and of the matters and things and other information which were to be contained in any of the said crop reports, including said cotton crop reports, knowledge of which was so, as aforesaid, acquired by him, the said Edwin S. Holmes, jr., as such associate statistician, until the said reports had been prepared, officially approved, and issued and published as aforesaid; and it

> was the duty of the said Edwin S. Holmes, jr., as such associate statistician, to thereafter honestly and carefully guard and keep secret and not divulge to any person not employed in or connected with said Bureau of Statistics any of the statistics and statistical matter and matters and things and other information last aforesaid, knowledge of which was so, as aforesaid, acquired by him, except such matters and things and other information as were included in and officially made public in said reports.

Furthermore, the department, on December 19, 1901, made an order that—

> No information in regard to transactions of an official character is to be communicated to anyone not connected with the public business.

And the statute forbade publication until after approval by the Secretary, and designated certain days for publication. Consequently, both the law and the evidence sustain the finding of the commissioner on this point.

(c) *That it is not shown that in the conspiracy to have Holmes make inaccurate reports, the inaccuracy was to be any other than that resulting from honest mistake of judgment or was in the nature of the report inevitable.* (Appellant's brief, p. 111.)

The following are some of the allegations of the indictments upon this subject:

> And that during the time and times aforesaid it was the duty of the said statistician and the said associate statistician and said

other officials and employees aforesaid of the said Bureau of Statistics *to prepare a true and accurate report upon each of the said crops, from the information as to said crops obtained as aforesaid*, and without regard to the influence which any such report might have upon the market price of the crop therein mentioned. (Indictment 26089, count 1, Rec., p. 140).

And that during the period last aforesaid it was the duty of said Edwin S. Holmes, jr., as such associate statistician, whenever he prepared or assisted in preparing any of said reports, to prepare and assist in preparing a true and accurate report from the information as to said crops obtained as aforesaid and without regard to the effect which such report might have upon the market price of the crop therein mentioned. (Indictment 26088, 2d count, Rec., p. 119.)

In violation of the duty of him, the said Edwin S. Holmes, jr., to prepare and assist in preparing the said cotton crop reports *truly and accurately from the information as to the said crops obtained as aforesaid*, and without regard to the influence of such reports upon the market price of cotton, the said Edwin S. Holmes, jr., in assisting in preparing the said cotton crop report to be issued in the month of June then next following, *was to cause and procure the said report to state that there has been planted in cotton throughout the United States a greater number of acres of land and that the condition of the cotton crop was better than would be shown by such report if it had*

been based upon the information as to said cotton crop obtained as aforesaid and had been truly and accurately prepared. (Indictment 26088, 2d count, Rec., p. 120.)

In the first and second counts of indictment No. 26088 (Rec., pp. 113, 114, 116, 117) it is described in detail from what sources, by whom, and in what manner the information upon which the report is based is gathered. It appears, therefore, from the allegations of the indictments that certain information was to be obtained and that the reports were to be based on that information, but that under the conspiracy Holmes was, as the result of the bribery, to make the reports appear differently from what they would have appeared had they been honestly computed from this information.

(*d*) *That the evidence shows that Price was not in the District of Columbia during the time mentioned in the indictments, and could not, therefore, have committed any of the offenses there.*

This question is discussed on pages 4–8 of the brief heretofore filed by the Government in this case.

It is insisted, therefore, that the judgment of the court below should be affirmed.

J. A. Fowler,
Assistant Attorney-General.
Jesse C. Adkins,
Special Assistant to the Attorney-General.

○

PRICE *v.* HENKEL, UNITED STATES MARSHAL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 385. Argued January 7, 1910.—Decided February 21, 1910.

Haas v. *Henkel*, *ante*, p. 462, followed as to jurisdiction of commissioner under § 1014, Rev. Stat., to remove accused who has also been indicted in the district from which removal is sought.

One good count in an indictment, under which a trial may be had in the district to which removal is sought, is enough to support an order of removal in *habeas corpus* proceedings, *Horner* v. *United States*, 143 U. S. 207, even though accused may be held to bail in the district from which removal is sought on an indictment of which some of the counts are similar.

But an indictment which alleges that the offense was committed in the district where found, does not conclusively destroy the *prima facie* case made in a removal proceeding by the indictment found in the district to which removal is sought and which alleges that the offense was committed therein, and if the commissioner also heard evidence upon which he based his decision, that decision is not open to review in *habeas corpus* proceedings.

In this case the independent evidence which was offered to show that accused was not in the district where the indictment was found was not conclusive.

163 Fed. Rep. 904, affirmed.

THE facts are stated in the opinion.

Mr. DeLancey Nicoll, with whom *Mr. John D. Lindsay*, *Mr. Howard S. Gans* and *Mr. Thomas Staples Fuller* were on the brief, for appellant.

Mr. Jesse C. Adkins, Special Assistant to the Attorney General, with whom *Mr. Assistant Attorney General Fowler* was on the brief, for appellee.

MR. JUSTICE LURTON delivered the opinion of the court.

The appellant, Theodore H. Price, was, on March 1, 1909,

committed by a United States commissioner for the Southern District of New York to the custody of the appellee, as marshal for that district, to await an order of removal to the District of Columbia, for trial upon two indictments, numbered respectively 26,088 and 26,089, being two of the indictments considered in the case of *Haas* v. *Henkel*, just disposed of. Price thereupon filed his petition in the Circuit Court of the United States for the Southern District of New York, alleging that his imprisonment was unlawful and in violation of the Constitution of the United States, and praying for a writ of *habeas corpus* and certiorari, and that he might be discharged from such arrest. Upon a hearing, his petition was dismissed and he was remanded to the custody of the marshal. From this order he has prayed this appeal.

This appeal and that of Haas were argued together, the difference between the two being slight. The two New York indictments against Price which he had been held to answer when these removal proceedings were begun were numbered 307 and 308. The first charged him with having entered into a conspiracy with Moses Haas, Edwin S. Holmes, Jr., and other persons unknown, to defraud the United States, and the other charged him with having conspired with Haas to bribe Holmes, an official in the Statistical Bureau of the Department of Agriculture, to violate his duty. These indictments allege the conspiracy to have been formed in the Southern District of New York. They are in all respects similar to the two District of Columbia indictments against the same persons, which lay the *locus* of the conspiracy in the District of Columbia, except that certain counts in the latter indictments charge particular offenses not charged in either of the New York indictments.

It is now insisted that the order of the commissioner committing appellant to the custody of the marshal to await a removal is void:

1. Because § 1014, Rev. Stat., does not authorize a removal from the district where an accused is found when he

is there under bail to answer local indictments for the same offense.

2. That the commitment to await an order of removal was illegal and an abuse of power, because the District of Columbia indictments did not substantially charge any offense against the United States.

3. That the record certified by the commissioner under the certiorari issued by the Circuit Court does not show any evidence justifying a conclusion that there was probable cause to believe that the appellant had committed any crime in the District of Columbia.

As two of the counts included in one of the District of Columbia indictments are for particular offenses, similar in character, but not identical with those covered by either of the two New York indictments, it is apparent that appellant has not been held in New York to answer all of the offenses which he is charged with having committed in the District of Columbia, and could not be brought to trial under the New York indictments for the offenses charged by the fifth and seventh counts of one of the District of Columbia indictments. This alone serves to take the case out of the precise situation presented by the first objection against the order made by the commissioner. If there is one good count under which a trial might be had in the district to which the removal is sought, it is enough to support an order in a *habeas corpus* proceeding. *Horner* v. *United States*, 143 U. S. 207, 214.

But for the reasons already stated in the opinion in the *Haas case*, just handed down, we are of opinion that absolute identity in the two sets of indictments does not operate to defeat a removal, if the Government elect to try in another district, and that the only function of a commissioner before whom a removal complaint is made in such a situation is to be satisfied that there is probable cause to believe that the accused is guilty of an offense charged to have been committed in the district to which the removal is sought. This case, upon this point, as well as upon the point that the two indictments here

involved do not sufficiently charge an offense against the United States, is governed by the opinion and judgment in the *Haas case*.

This brings us to the only question which is not necessarily concluded by the opinion in the *Haas case*, namely, whether there was any substantial evidence before the commissioner upon which he might, in the exercise of his jurisdiction, decide that there was probable cause for believing that appellant had committed, within the District of Columbia, the offenses charged in the indictments against him found in that district.

That at least a *prima facie* case for the removal was made by the introduction of the indictments returned against him in the District of Columbia is not disputable. That much efficacy is attributed to a certified copy of an indictment found in a competent court of another district when put in evidence in a removal proceeding. *Bryant* v. *United States*, 167 U. S. 104; *Greene* v. *Henkel*, 183 U. S. 249; *Hyde* v. *Shine*, 199 U. S. 62; *Beavers* v. *Henkel*, 194 U. S. 73. But the evidence of probable cause afforded by the indictment is not conclusive. For this reason it has been held that the refusal of a commissioner to hear evidence offered for the purpose of showing that no offense had been committed triable in the district to which removal was sought, would be a denial of a right secured under the Constitution. *Tinsley* v. *Treat*, 205 U. S. 20. But in this case there was no closing of the door to evidence offered to show a want of probable cause. Copies of the New York indictments against appellant for many of the same offenses were received in evidence, as tending to show that the conspiring, if any there was, had been done in New York and not in the District of Columbia. Some evidence tending to show that Price was not in the District of Columbia at the time when the conspiracies are charged to have been formed was also introduced. There was also some evidence offered questioning the identity of the appellant with the person accused by the District of Columbia indictments. The probative weight of certified copies of the New York indictments is necessarily

limited to such counts as are identical in the two sets of indictments. This would leave counts five and seven of indictment No. 26,088 unaffected as evidence of probable cause, and justify the order of commitment, although there might be conclusive evidence that the offense charged in the other counts had not been committed in the District of Columbia as charged. *Horner* v. *United States*, 143 U. S. 207.

But it cannot be conceded that the introduction of copies of the New York indictments operated to destroy the evidential effect of the indictments found in the District of Columbia, even as to the identical counts. In the case of *Haas* v. *Henkel* we held that such evidence did not so conclusively destroy the evidence afforded by copies of the District of Columbia indictments as to leave no testimony upon which the commissioner might, upon the whole case, decide that there was proof of probable cause.

The commissioner had before him competent evidence in the certified copies of the District of Columbia indictments upon which he might base a conclusion of probable cause. At most, the New York indictments, together with the evidence tending to prove that appellant had not been in the District of Columbia at any of the times when the conspiracy was said to have been formed, only made an issue which the commissioner had jurisdiction to decide, and when we find from the proceedings before him that he did hear such evidence upon which he might base his decision, that decision is not open for review upon a petition for a writ of *habeas corpus*. *In re Oteiza y Cortes*, 136 U. S. 330; *Bryant* v. *United States*, 167 U. S. 104; *Greene* v. *Henkel*, 183 U. S. 249, 261; *Hyde* v. *Shine*, 199 U. S. 62, 84. This is the rule as stated by Mr. Justice Brown, speaking for the court in *Hyde* v. *Shine*, cited above, where it was said:

"In the Federal courts, however, it is well settled that upon *habeas corpus* the court will not weigh the evidence, although, if there is an entire lack of evidence to support the accusation, the court may order his discharge. In this case, however, the

production of the indictment made at least a *prima facie* case against the accused, and if the commissioner received evidence on his behalf it was for him to say whether, upon the whole testimony, there was proof of probable cause. *In re Oteiza*, 136 U. S. 330; *Bryant* v. *United States*, 167 U. S. 104. The requirement that the usual mode of process adopted in the State shall be pursued refers to the proceedings for the arrest and examination of the accused before the commissioner, but it has no bearing upon the subsequent independent proceeding before the Circuit Court upon *habeas corpus*. In this case the commissioner did receive evidence on behalf of the appellants, and upon such evidence found the existence of probable cause and committed the defendants, and, upon application to the District Judge for the warrant of removal, he reviewed his action, but did not pass upon the weight of the evidence."

The evidence independent of that afforded by the New York indictments, relied upon to show that appellant was not in the District of Columbia when the conspiracy is charged to have been formed, has been examined. It cannot be said to be at all conclusive. First, it leaves out of consideration the fact that the indictments may be sustained by evidence of a conspiracy formed at dates before the finding of the indictment, other than those named, if not barred by the statute of limitations. *Ledbetter* v. *United States*, 170 U. S. 606, 612. Second, it does not exclude the possibility that the conspiracy may have been formed in the District of Columbia without appellant being physically present when the conspiracy was formed. *In re Palliser*, 136 U. S. 257, 265; *Burton* v. *United States*, 202 U. S. 344, 387; *United States* v. *Thayer*, 209 U. S. 39, 43. In *Burton* v. *United States*, cited above, it was said by this court that "the constitutional requirement is that the *crime* shall be tried in the State and district where committed, not necessarily in the State or district where the party happened to be at the time."

Upon the whole case, we are satisfied that there is not shown that entire absence of evidence, which, upon an appeal

like this, would require us to hold that the decision that there was probable cause was void as not based upon any evidence.

Final order affirmed.

BREWER, J., concurring.

I concur in affirming the orders of removal in these cases, but my concurrence must not be taken as holding that the indictments will stand the final test of validity or sufficiency. Assuming that there is a doubt in respect to these matters, as I think there is and as seems to be suggested by the opinion in No. 367, I am of the opinion that such doubt should be settled by direct action in the court in which the indictments were returned, and not in removal proceedings.

MR. JUSTICE MCKENNA concurs in the result, but reserves opinion whether the facts alleged in the indictment constitute a conspiracy to defraud the United States.